No. 93-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
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MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act, which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203's tariff-filing requirement optional for telephone companies that lack market power.

RULE 29.1 STATEMENT

MCI Telecommunications Corporation, Inc. is a wholly-owned subsidiary of MCI Communications Corporation. MCI Communications Corporation is a publicly held corporation engaged in a wide variety of telecommunications businesses, including but not limited to national and international voice and data telecommunications services and information services. MCI directly or indirectly owns interests in General Communications Corporation, and AAP Telecommunications Pty. Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioner MCI Telecommunications Corporation ("MCI") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above proceeding on June 4. 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported, and is reprinted at pages 1a to 2a of the appendix to this petition ("Pet. App."). The opinion invalidated a rulemaking order of the Federal Communications Commission. The Commission's rulemaking order is reported at 7 FCC Rcd. 8072 (1992), and is reprinted at pages 3a to 36a of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 4, 1993. The jurisdiction of this Court to review the judgment is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, provides, in relevant part:

(a) Filing; public display.

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements.

(1) No change shall be made in the charges, classifications, regulations, or practices which have been

so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates.

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT OF THE CASE

This case involves the power of the FCC to modify tariff-filing requirements under Section 203 of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 203.[1] Section 203(a) requires telephone companies to file tariff schedules with the FCC listing the interstate services they offer and the rates at which those services are offered. Section 203(b)(2) delegates to the Commission the power to "modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions."

Pursuant to Section 203(b)(2), the Federal Communications Commission ("Commission" or "FCC") issued a series of rulemaking orders during the 1980s to make tariff filing optional for certain "nondominant" telephone companies (*i.e.*, those lacking market power). The Commission explained that "traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."[2] The Commission reaffirmed this "permissive detariffing rule" in a rulemaking order released on November 25, 1993 (*"November 25 Report and Order"*).[3] According to the Commission, permissive detariffing is "one of the cornerstones of . . . regulation of the long distance industry."[4]

The D.C. Circuit, relying on decisions which predated the *November 25 Report and Order* and thus did

[1] In addition to the parties listed in the caption, the following participated in the proceedings below: the United States, the Federal Communications Commission, Ad Hoc Telecommunications Users Committee, US Sprint Communications Company, US WEST Communications Company, Ameritech Operating Companies, International Business Machines Corporation.

[2] 7 FCC Rcd. 8072, 8073 (1992); Pet. App. 3a, 6a.

[3] 7 FCC Rcd. 8072; Pet. App. 3a.

[4] *In re AT&T v. MCI*, 7 FCC Rcd. 807 (1992).

not consider the FCC's views on the meaning of Section 203(b)(2), summarily reversed. Pet. App. 1a. MCI seeks plenary review of that decision.

1. Development of the Permissive Detariffing Rule

Until the 1970's, AT&T's ownership of the vertically-integrated Bell System afforded it a monopoly over interstate telephone service. Competitive challenges to the Bell System began to develop in the 1970's as a result of advances in technology, which reduced the investment required to enter the market, and Commission decisions permitting competition in certain services.

Responding to these changes, the FCC commenced a rulemaking in 1979, called the *Competitive Carrier* proceeding, to consider how regulation should evolve to accommodate the emerging era of competition in the long-distance market. In its *First Report and Order* in 1980, the Commission determined that the tariffing requirements of Section 203 should apply more stringently to dominant carriers (such as AT&T) than to nondominant carriers. Dominant carriers, the Commission concluded, possessed sufficient market power to set unreasonable or discriminatory prices contrary to the goals of the Communications Act, 47 U.S.C. §§ 201, 202, while nondominant carriers could not do so because they were constrained by operation of the market. 85 F.C.C. 2d 1, 20-21 (1980).

In 1981, the Commission proposed that the obligation on certain nondominant carriers to comply with the tariffing requirements of Section 203 be made "permissive," *i.e.*, optional. *Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445 (1981). The Commission expressly concluded that its power under Section 203(b) to "modify any requirement . . . of this section" authorized "remov[al] of the requirement of tariff filings where appropriate." 84 F.C.C. 2d at 478-80. The Commission noted that requiring competitive firms without market power to file tariffs "has worked the perverse effect of imposing a measure

which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." 84 F.C.C. 2d at 478-79. After considering comments responding to this notice, the Commission made tariffing optional for certain limited classes of nondominant carriers.[5]

In its *Fourth Report and Order,* the Commission extended the permissive detariffing rules to nondominant facilities-based carriers such as MCI. 95 F.C.C. 2d 554 (1983). The Commission carefully analyzed the relevant product and geographic markets to determine that these carriers lacked market power. 95 F.C.C. 2d at 562-75. It noted that, based upon its three years of reviewing streamlined tariffs from nondominant carriers, "[t]here is no evidence that it is in the public interest for us to continue receiving . . . [these tariff] filings . . . to prevent them from charging unjust or unreasonable rates or making service unavailable." 95 F.C.C. 2d at 578 & n.79. The Commission further noted that "[i]t is costly for carriers to prepare tariff-filings under our rules for dominant carriers . . . [and] these filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Id.* at 555 n.1. The Commission concluded: "We believe that the purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and burdens for non-dominant carriers." *Id.* at 579. Neither AT&T nor any other party petitioned for judicial review of the permissive detariffing rule set forth in the *Fourth Report and Order.*

This regulatory change did not produce wholesale abandonment of tariff filings by nondominant carriers. To the

[5] In 1982, the Commission formally adopted the permissive tariffing rules for one group of carriers, domestic resellers of telecommunications services who do not own facilities. *Second Report and Order,* 91 F.C.C. 2d 59 (1982). In 1983, these rules were extended to cover resellers operating on domestic off-shore points. *Third Report and Order,* 48 Fed. Reg. 46,791 (Sept. 28, 1983).

contrary, as the Commission expected, MCI and other nondominant carriers continued to file tariffs for the large majority of their common carrier services.

In 1985, the Commission sought to go beyond the permissive detariffing rules and *forbid* non-dominant carriers from filing tariffs of any sort. *Sixth Report and Order,* 99 F.C.C.2d 1020 (1985). MCI opposed mandatory detariffing as inconsistent with the flexibility the Commission's permissive tariffing rules were intended to promote. Though expensive and somewhat cumbersome, tariffs do provide certain administrative conveniences, such as when a contractual relationship is needed with millions of individual customers.[6] The D.C. Circuit invalidated mandatory detariffing on the ground that it exceeded the scope of the modification power conferred by Section 203(b). *MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186, 1192 (D.C. Cir. 1985). The court expressly declined to consider whether the *permissive* detariffing rule of the *Fourth Report and Order* was within the FCC's delegated authority. *Id.* at 1190 n.4.[7] The panel distinguished permissive detariffing, holding that the FCC "fundamentally altered" that policy when it implemented mandatory detariffing in the *Sixth Report and Order. Id.* at 1190. The D.C. Circuit's decision thus left in place the Commission's permissive detariffing regime.

[6] Prior to the *Fourth Report and Order,* MCI filed tariffs for all its services. Following that decision, MCI continued to file tariffs for most services, but, like AT&T and other carriers, it began to contract with customers for individually negotiated service arrangements. Because it is regulated as a "dominant" carrier by the FCC, AT&T is required to file tariffs covering these negotiated service arrangements after the contracts are signed. *MCI Communications Corporation v. FCC,* 917 F.2d 30, 33 (D.C. Cir. 1990). MCI, like other nondominant carriers relying on the permissive tariffing rule, may or may not have tariffed these negotiated rates.

[7] The panel described its inquiry narrowly: "whether the Commission has statutory authority to prohibit common carriers from filing tariffs." 765 F.2d at 1188.

2. Proceedings Before the Commission

a. *AT&T's Complaint Proceeding*

On August 7, 1989, four years after the D.C. Circuit decision invalidating the *Sixth Report and Order* and almost six years after the *Fourth Report and Order* authorized permissive detariffing for carriers such as MCI, AT&T filed an administrative complaint with the FCC alleging that MCI had violated Section 203 by providing untariffed services to certain large business customers. AT&T sought damages and prospective relief. AT&T made clear that its principal objection was not to permissive detariffing *per se* but to the FCC's refusal to extend it to AT&T.[8] MCI defended on the ground that it had adhered to the unchallenged rules set forth in the *Fourth Report and Order*.

On January 28, 1992, the Commission denied AT&T's damages claim on the ground that it would be "manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability."[9] The FCC dismissed AT&T's claims for prospective invalidation of the permissive detariffing rule. Finding AT&T's claim to be "in practical effect a challenge to the Commission's previously adopted and effective" permissive detariffing rule, the Commission determined that the issue should be decided in a rulemaking proceeding because "the rule represents one of the cornerstones of our regu-

[8] *See* Letter from Francine Berry (AT&T) to Donna Searcy, Secretary, Federal Communications Commission, dated August 7, 1989 ("The Commission's regulatory reforms have not kept pace with the fierce growth of [long distance] competition. Rather than a temporary, transitional measure, the *Competitive Carrier* structure has become a seemingly-permanent imbalance that imposes onerous regulatory requirements uniquely and unfairly on one participant in an intensely competitive market.").

[9] *In re AT&T v. MCI*, 7 FCC Rcd. 807, 809 (1992).

lation of the long-distance industry" and "[a]ny change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation."[10] Thus, the Commission's resolution of AT&T's complaint against MCI did not express a view as to the legality of permissive detariffing.

b. *The Rulemaking Proceeding*

On the same day it dismissed AT&T's complaint, the Commission instituted a rulemaking to re-examine the rule in light of AT&T's challenge. *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 804 (1992). More than 40 parties, including AT&T, submitted comments in response to the Commission's notice. On November 5, 1992, the Commission announced the results of the rulemaking proceeding, reaffirming the validity of the permissive detariffing rules. On November 25, 1992, the Commission released the text of its formal Report and Order. In this *November 25 Report and Order*, the Commission completed a comprehensive analysis of the importance of the permissive detariffing rule, and of the Commission's authority under the Communications Act of 1934 to promulgate it. *See* Pet. App. 33a.

The Commission addressed Section 203(a), which states that "every carrier" shall file tariffs for common carrier services, but noted that Section 203(b) specifically permits the Commission to "modify any requirement made by or under the authority of this section . . . by general order applicable to special circumstances or conditions." The Commission concluded that "by its terms, Section 203(b) limits the . . . modification power in one circumstance only—the FCC may not expand the 120-day notice period for tariff filings." Pet. App. 43a. The existence of this single, narrow limit on the Commission's

[10] 7 FCC Rcd. at 809.

modification power "strongly suggests that Congress did not otherwise intend to limit that power." *Id.*

The Commission also concluded that Congress was fully aware of the permissive detariffing policy, and repeatedly acquiesced in it. Pet. App. 51a. The Commission explained that Congress' "recent enactment of the TOCSIA [the Telephone Operator Consumer Services Improvement Act of 1990] . . . demonstrated its awareness" of permissive detariffing, and that Congress "made no effort to disturb it." Pet. App. 23a (citing S. Rep. No. 101-439, 101st Cong., 2d Sess. 3 & n.10) (August 30, 1990)). In enacting TOCSIA, Congress specifically legislated to impose tariffing requirements for a subset of services by nondominant carriers—an action that would have been wholly gratuitous had Section 203 been understood as imposing an unwavering tariff requirement. Pet. App. 23a-24a. The Commission also noted that contemporaneous with the consideration of TOCSIA, Congress amended Section 203 itself and left the Commission's permissive detariffing policy undisturbed. *Id.*

The Commission also reviewed the rationale for permissive detariffing, and concluded that reversal of this policy would thwart the purposes of the Communications Act because the policy "played a major role in the rapid development of competition and in the consumer benefits that have resulted." Pet. App. 56a, 59a. The Commission determined that "but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered the competitive fray at all." *Id.* The Commission reaffirmed that, notwithstanding permissive detariffing, it continued to possess ample ability to enforce the reasonableness and antidiscrimination provisions of the Communications Act.

3. The D.C. Circuit's Invalidation of the Permissive Detariffing Rule

While the rulemaking was pending, AT&T petitioned the D.C. Circuit for review of the Commission's decision to dismiss AT&T's complaint against MCI. Both the Commission and MCI argued that the appeals court need not and should not decide the validity of the Commission's permissive detariffing rule, which was being considered in the separate rulemaking proceeding. On November 5, 1992—after oral argument on the appeal but before the panel's decision had issued—the court was informed that the Commission had reaffirmed permissive detariffing and that a formal rulemaking order setting forth the Commission's views would issue shortly. Nevertheless, on November 13, 1992, the court issued an opinion invalidating the permissive detariffing rule.

The panel reversed the Commission's dismissal of AT&T's complaint as "arbitrary and capricious" on the ground that the FCC should have expressly decided the legality of the permissive detariffing rule in AT&T's complaint proceeding, even though the Commission explicitly stated it would resolve that issue in the rulemaking later completed on November 25, 1992. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Pet. App. 37a. Instead of remanding, however, the appeals court decided that it would address the issue in the first instance. The panel held that the court's earlier decision invalidating the Commission's *mandatory* detariffing rule, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), "foreclose[d] the Commission's argument in this case":

> We said in *MCI* that the language of section 203(b) "suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." [765 F.2d at 1190.] To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." *Id.*

> (quoting Black's Law Dictionary 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the Sixth Report, or simply permissive, as in the Fourth Report, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act.

978 F.2d at 736 (footnote omitted); Pet. App. 16a.[11] The court rejected the argument that Section 203(b) empowers the FCC to authorize permissive detariffing, despite conceding that it "was not insubstantial when made initially" in 1985, and that the prior panel in *MCI v. FCC* did not test the argument against the controlling principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 978 F.2d at 735 n.11; Pet. App. 52a.

MCI petitioned for certiorari. Prior to disposition of that petition, AT&T sought D.C. Circuit review of the *November 25th Report and Order*, which had issued in the rulemaking proceeding, and sought summary reversal on the basis of the court's prior opinion in *AT&T v. FCC*. The United States acknowledged that MCI's petition for certiorari raised substantial issues, but argued that review "would be premature unless and until a decision by the court of appeals sets aside those rules on review of the [November 25th] *Rulemaking Order* after full consideration of the Commission's justification." [12] The United States noted that "[t]he Commission has not yet had the opportunity to submit its full justification for the permissive detariffing rules to the court of appeals

[11] In a timely petition for rehearing, MCI sought to bring the *November 25 Report and Order* to the attention of the court, and to encourage the court to reconsider its decision in light of the Commission's later-issued decision. On January 21, 1993, the court denied the petition without comment.

[12] *See* Brief in Opposition for the Federal Respondents, No. 92-1684, at 12.

and to secure an appellate decision that takes account of that justification." [13] Certiorari was denied. 113 S. Ct. 3020 (1993).

On June 4, 1993, the D.C. Circuit summarily reversed the *November 25th Report and Order* on the ground that the prior panel decision in *AT&T v. MCI* "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." Pet. App. 2a. MCI now petitions for certiorari from the D.C. Circuit's ruling.

REASONS FOR GRANTING THE WRIT

Plenary review is necessary because the court of appeals, in disregard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has invalidated an entirely appropriate—and critically important—exercise of the FCC's delegated authority to modify the tariff requirements of Section 203. The importance of the FCC's permissive detariffing rule is beyond dispute. As the United States stated at the certiorari stage in *AT&T v. FCC*, "the court of appeals' rejection of the Commission's permissive detariffing rules is a matter of substantial concern" because "the rules represent a 'cornerstone' of its regulation of the long-distance industry, and their removal is likely to have an adverse and anticompetitive impact on many providers of telecommunications services and their customers." [14]

The decision to invalidate this "cornerstone" of the Commission's regulatory structure conflicts with *Chevron*'s "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers," and with cases applying *Chevron* in closely analogous circumstances. *Na-*

[13] *Id.*

[14] Brief in Opposition for the Federal Respondents, No. 92-1684, at 11.

tional R.R. Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394, 1401-02 (1992); *see Sullivan v. Everhart*, 494 U.S. 83, 92-93 (1990). This Court has repeatedly granted certiorari to review decisions misapplying *Chevron*—irrespective of any circuit conflict—when the appeals court ruling threatened the foundations of important agency policies. *E.g., National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (1992); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 644 (1990). Plenary review in such circumstances is particularly necessary to ensure that reviewing courts respect "the proper roles of the political and judicial branches" and do not usurp the agency's appropriate policymaking functions on matters of substantial concern. *Pauley v. Bethenergy Mines*, 111 S. Ct. 2524, 2534 (1991).

1. The Commission promulgated its permissive detariffing rule in an exercise of authority expressly delegated by Congress in Section 203. *See November 25 Report and Order*, Pet. App. 13a-14a. Section 203(b)(2) empowers the Commission to "modify any requirement made by or under the authority of this section either in particular circumstances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). On its face, this language authorizes modification of "any" requirement of Section 203(a), including the "requirement" that carriers file tariffs for all services. The issue, therefore, is whether the Commission's permissive detariffing rule was a proper exercise of its delegated authority to "modify" that requirement.

Resolution of that issue turns on application of the legal standards set forth in *Chevron*. Under *Chevron*, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. Rather, the reviewing court must consider whether "Congress has . . . directly addressed the precise question at issue." 467 U.S. at 842-43. If not, the reviewing court must affirm any reasonable agency interpretation of the statutory provision. *Id.*

When Congress enacted Section 203(b) in 1934, it plainly did not intend to speak to the "precise question" whether Section 203's tariff-filing requirements could be made optional for nondominant long-distance carriers in an emerging competitive market. The 1934 Congress faced a long-distance telephone industry over which AT&T held an unchallenged monopoly.[15] Tariff regulation and other pricing controls of the kind included in the Communications Act, in a regime of close government supervision, were—then as now—a commonly accepted method of regulating monopoly. However, Section 203 contained no express prohibition against modification of the tariff filing requirement for any class of carrier.

What Congress did directly address in 1934 was the need to vest in the Commission versatile authority to tailor its regulatory regime to the evolving circumstances of a complex industry. Congress expressly delegated flexible powers to the Commission *under Section 203* to act in accord with its views of what the public interest requires. The delegation in Section 203(b) is consistent with the overall scheme of the Communications Act, which is, as the Court has recognized, "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *Cf. NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 128 (1987).[16]

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[15] *See, e.g.*, S.Rep. No. 781, 73d Cong., 2d Sess. 87 (1934).

[16] *See also* 47 U.S.C. § 154(i) (empowering the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); *New England Tel. & Tel. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987) (terming § 154(i) a "necessary and proper clause"), *cert. denied*, 490 U.S. 1039 (1989).

None of the three D.C. Circuit decisions that have resulted in rejection of the FCC's permissive detariffing rule applied these *Chevron* principles to determine whether the Commission's interpretation of its Section 203(b) power to "modify any requirement" of Section 203 encompassed the power to promulgate the permissive tariffing rule. The 1985 decision in *MCI v. FCC* never cited *Chevron*, or considered whether the modification power delegated to the FCC in Section 203(b) justified the permissive detariffing rule under the standards set forth in *Chevron*. The November 1992 decision in *AT&T v. FCC* acknowledged that the prior panel did not address *Chevron*, 978 F.2d at 735 n.11; Pet. App. 52a, but did not undertake the analysis itself. Instead the *AT&T v. FCC* panel held that prior ruling "foreclosed" the interpretation of Section 203 advanced by the Commission—even though, as the court conceded, the FCC's argument "was not insubstantial when made initially," and had not been resolved by the prior panel. 978 F.2d at 735-36; Pet. App. 53a. The appeals court's June 4, 1993 summary decision merely cited to these prior decisions without any analysis.

In the course of reaching this result, the court of appeals applied a rule of statutory construction that conflicts directly with this Court's consistent approach under *Chevron*. Reviewing courts may forego *Chevron* deference to agency interpretations only if the statutory term at issue "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990). Webster's Dictionary alternatively defines "modify" to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *See* Webster's Ninth New Collegiate Dictionary 763 (1988). The latter definition comfortably encompasses the Commission's permissive detariffing rule.[17]

[17] The FCC did not eliminate the tariffing requirement. AT&T, which accounts for approximately two-thirds of long-distance traffic, must file tariffs. Nondominant carriers continue to file tariffs for the majority of their services.

This Court repeatedly has held that "the existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation." *Boston & Maine Corp.*, 112 S. Ct. at 1402; *accord Sullivan v. Everhart*, 494 U.S. at 91-92.[18] "Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." *Boston & Maine Corp.*, 112 S. Ct. at 1402. The appeals court's refusal to afford *Chevron* deference in this case thus conflicts directly with the approach set forth in *Boston & Maine Corp.* and *Everhart*. The ordinary meaning of the word "modify" in Section 203(b) is sufficiently ambiguous to require deference to the Commission's reading.

3. Indeed, it is the court of appeals' contrary reading that cannot easily be squared with the text and structure of Section 203. The court of appeals focused on the word "shall" in § 203(a) and termed it the "language of command." 978 F.2d at 735; Pet. App. 53a. But in Section 203(a) the word "shall" is directed entirely at private parties; by its terms, this statutory language does not direct the Commission to do anything. The statutory language directed at the Commission is Section 203(b), which permits modification of the requirement that car-

[18] Indeed, this case is much like *Boston & Maine Corp.*. At issue in that case was the meaning of the word "required" in a statute authorizing condemnation of property "required" for Amtrak's operations. The D.C. Circuit held that the statutory term was unambiguous, and conferred only a narrow condemnation authority in instances where the desired property was "indispensable" to Amtrak's operation. 911 F.2d 743. This Court applied *Chevron* and reversed. The Court acknowledged that "required" would bear the narrow meaning ascribed by the Court of Appeals, but found ambiguity because standard dictionary sources contained far broader definitions. This ambiguity was, as the Court made clear, sufficient to require *Chevron* deference.

riers "shall" file tariffs. Section 203(b)'s express withdrawal of the authority to alter the 120-day requirement provides further support for the Commission's reading. As the Commission found, the existence of this single, narrow limit on the Commission's modification power "strongly suggests that Congress did not otherwise intend to limit that power." Pet. App. 14a. Where, as here, Congress' intent is not manifest, the statutory construction principle *expressio unius est exclusio alterius* indicates that, by limiting the Commission's power in one specific way, Congress intended no other limits. *See Tennessee Valley Authority v. Hill,* 437 U.S. 153, 188 (1978).

Moreover, Section 203(c) makes clear that the 1934 Congress contemplated untariffed service. That provision expressly states that:

> No carrier, *unless otherwise provided by or under authority of this chapter,* shall engage or participate in such communication unless schedules have been filed and published . . .

47 U.S.C. § 203(c) (emphasis added). This provision—which the court of appeals never mentioned in any of the opinions resulting in invalidation of the permissive detariffing rule—expressly addresses the legality of carriers providing service without filing tariffs. It prohibits untariffed service "unless otherwise provided by or under authority of this chapter." That proviso plainly presumes the existence of authority in the Commission to authorize untariffed service. The statutory sequence is further evidence that Section 203(b) delegated far broader authority than the court of appeals presumed; this language in Section 203(c) immediately follows the sentence in Section 203(b) including the key word "modify." The power to "modify" conferred by Section 203(b) thus plainly encompasses the power to authorize untariffed service for specific classes of carriers.

4. Other indicia of congressional intent also strongly support the Commission's interpretation. As the Commission noted in the *November 25 Report and Order,* Pet. App. 22a, Congress has for many years been aware of and acquiesced in the permissive detariffing rule.[19] In 1989, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) to require nondominant carriers servicing pay phones to file tariffs. Such a statutory change would have been redundant had Section 203 already required tariffs for all carriers. The Senate Report on TOCSIA described permissive detariffing in detail as it applied to pay phone services, and explained that the Commission's approach had not been entirely successful. *See* S.Rep. No. 101-439, 101st Cong., 2d Sess. 3 & n.10 (1990) (citing the *Competitive Carrier* proceedings). TOCSIA requires the pay phone companies to file informational tariffs, noting that it does not expect these to be as detailed as those filed by dominant carriers. TOCSIA also expressly permits the Commission to waive this requirement after three years. This regime clearly is premised on the existence, indeed on a baseline, of permissive detariffing—pay phone companies would get no benefit from the waiver if they were required to tariff under Section 203. Furthermore, Congress specifically amended Section 203(b) in 1990. Congress was plainly aware of the Commission's interpretation of that provision at the time of amendment.[20]

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[19] *See, e.g., Long-Distance Competition: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation,* 99th Cong., 1st Sess., 105 (1985) (Statement of Commissioner James H. Quello) (explaining permissive detariffing); *Federal Telecommunications Policy Act of 1986: Hearings on S.2565 Before the Senate Committee on Commerce, Science and Transportation,* 99th Cong., 2d Sess. 89 (1986) (Statement of Commissioner Fowler) (same).

[20] *See FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House*

Congress' judgment not to disturb the Commission's interpretation—as well as its recognition of current Commission policy—demonstrate approval of the Commission's interpretation of its modification authority under Section 203(b). *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (Congress' failure to change a scheme when revisited is persuasive evidence); *United States v. Rutherford*, 442 U.S. 544, 554 (1979) ("once an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned" (quotation omitted)).

5. This Court's 1990 decision interperting the tariff requirements of the Interstate Commerce Act ("ICA") in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), does not require a contrary conclusion.

First, *Maislin* addressed only the power of the Interstate Commerce Commission ("ICC") to excuse a carrier's past violation of the tariff requirements in the ICA.[21] *Maislin* did not consider the power of the ICC to *modify* tariff requirements under the ICA. Neither of the two ICC actions under review in *Maislin* relied upon or even

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Committee on Energy and Commerce, 101st Cong., 1st Sess. 30 (1990) (noting the distinction between dominant and nondominant carriers).

[21] *Maislin* involved an attempt by a carrier's bankruptcy trustee to collect from a shipper the difference between the tariffed rate and the lower rate agreed to by the carrier prior to bankruptcy. The ICC expressly did not modify the tariff requirement, but instead focused on the equitable defenses that a shipper would have to a claim for undercharges, and the ICC's ability to determine "whether the collection of the undercharge in a particular case would constitute an unreasonable practice." *Maislin*, 497 U.S. at 121.

cited Section 10762, which empowers the ICC to modify requirements.[22] In contrast to *Maislin*, the instant case involves the explicit exercise by an agency of power expressly delegated to it by Congress to modify the tariff requirements in a regulatory scheme.[23] Thus, *Maislin* simply does not deal with the issue here.

Second, even if *Maislin* could somehow be construed as having addressed *sub silentio* the modification powers of the ICC under Section 10762(d)(1), the relevant portion of Section 203 of the Communications Act differs in critical respects from its ICA counterpart. As the Second Circuit has observed, Section 203 is in no sense a "carbon copy" of Section 10762. *See American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974).

Section 10762(d)(1) delegates to the ICC only a limited authority to "change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances." Thus, whereas Congress has plainly delegated to the FCC the broad authority to promulgate "general order[s]" that make fundamental changes in Section 203's regulatory design in order to respond to changes in the regulatory environment, Congress limited the authority of the ICC to grant-

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[22] *See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986) ("*Negotiated Rates I*"); *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C. 2d 623 (1989) ("*Negotiated Rates II*").

[23] The only discussion in *Maislin* of the ICC's modification power under § 10762(d)(1) occurred in a single footnote, and related only to the first sentence of § 10762(d)(1) (controlling changes to notice period requirements), and not the second sentence of the section (giving the ICC more general power to modify requirements). *Maislin*, 497 U.S. at 134 n.14. In any event, the Court explicitly declined to address the actions of the ICC under § 10762(d)(1). *See id.* ("We express no view today on the validity of such policies.").

ing case-specific changes in tariff requirements "in particular instances."

Structural differences in the two statutory schemes also indicate that the statutes should be interpreted differently. As the FCC explained in the *November 25th Report and Order*:

> the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761 respectively. The motor carrier analogue to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority in Section 203(b) applies, by its terms, to both the obligation to file tariffs (Section 203(a)) and the prohibition against untariffed offerings (Section 203(c)).

Pet. App. 47a.

Furthermore, as the Commission explained in the *November 25 Report and Order*:

> the *Maislin* court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the requirements of Section 10761(a), thus "demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." [quoting *Maislin*, 110 S. Ct. at 2271 (emphasis in original)]. Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.

Pet. App. 48a.

6. The appeals court's decision has severely damaged the Commission's public policy objectives in the long-distance market. Even the court of appeals "had no quarrel" with the objectives of the permissive detariffing rule, 978 F.2d at 736; Pet. App. 54a, which has, according to the Commission, "played a substantial role in the development of competition in the interexchange market and the increased choices for customers with respect to carriers and prices."[24] It is one thing for a court to interfere with agency policy and practices that benefit the public interest when Congress has left no other choice, but it is quite another to reach the same result when the statute expressly delegates flexible powers to the regulatory agency to reorient the regulatory regime to serve new ends, and the agency has exercised those powers. Because the text of Section 203(b) plainly delegates sufficient authority to support the Commission's permissive detariffing rule, there is simply no warrant for imposing the anachronistic tariff-filing requirement demanded by the court of appeals.

Indeed, the appeals' court's ruling has broad implications for the Commission's present and future efforts to exercise its power under Section 203(b) to modify tariff filing requirements in response to the evolution of the market for telephone services—both local and long-distance. The Commission has recently invoked its authority under Section 203(b) to promulgate streamlined tariff requirements for nondominant carriers, and AT&T has already indicated that it proposes to challenge the legality

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[24] *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, FCC 93-103, February 19, 1993, at ¶ 10.

of those requirements on the authority the interpretation of Section 203(b) contained in *AT&T v. FCC*. The D.C. Circuit's interpretation of Section 203(b) is likely to affect virtually every FCC effort to streamline tariff filing requirements in response to rapid changes in the market for telecommunications services. This is, in sum, a critical juncture. This Court has never spoken on the proper interpretation of Section 203. Clarity as to the scope of the Commission's authority under Section 203(b) is urgently needed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

No. 92-1628

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

INTERNATIONAL BUSINESS MACHINES CORPORATION,
et al.,
Intervenors

And Consolidated Case No. 92-1666

Before: Edwards, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary decision, the oppositions thereto and the reply, it is

ORDERED that the motion be granted and the order of the Federal Communications Commission (FCC) be summarily reversed. The merits of the parties' positions are so clear as to warrant summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1774

(D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The decision of this court in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 92-13

IN THE MATTER OF TARIFF FILING REQUIREMENTS FOR INTERSTATE COMMON CARRIERS

REPORT AND ORDER

Adopted: November 5, 1992

Released: November 25, 1992

By the Commission:

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I. INTRODUCTION

1. In a Notice, released January 28, 1992,[1] the Commission initiated this rulemaking to review the lawfulness and future application of the tariff forbearance rules we adopted nearly a decade ago in *Competitive Carrier*.[2] In particular, we sought comment on whether, in light of intervening court decisions and a challenge to those rules by the American Telephone and Telegraph Company (AT&T), the Commission had authority under the Communications Act of 1934 (Communications Act or the Act) "to continue to permit nondominant carriers not to file tariffs."[3] We also sought comment on regulatory alternatives in the event we determined that our existing tariff forbearance rules were unlawful.[4]

2. In response to the *Notice*, we have received and reviewed comments from more than 40 parties represent-

[1] *Tariff Filing Requirements for Interstate Common Carriers* (CC Docket No. 92-13), Notice of Proposed Rulemaking, 7 FCC Rcd 804, 57 Fed. Reg. 6487 (1992) (*Notice*).

[2] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* (CC Docket No. 79-252) (*Competitive Carrier*), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Competitive Carrier Further Notice*); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46,791 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.*, 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*MCI v. FCC*).

[3] *Notice*, 7 FCC Rcd at 805, para. 8.

[4] *Id.*

ing virtually every segment of the interstate telecommunications industry, including long distance carriers, local exchange carriers, and telecommunications users.[5] On the basis of this record, we now conclude that our existing tariff forbearance rules are lawful and serve the public interest. Accordingly, we reaffirm our decision in *Competitive Carrier* that domestic carriers classified as "nondominant" and subject to forbearance may, but need not, file interstate tariffs. Consequently, we do not address the additional issues raised in the *Notice*, which were conditioned upon a contrary finding.

II. BACKGROUND

A. *The Competitive Carrier Proceeding*

3. Until the 1960s, AT&T, through its then-subsidiary Bell Operating Companies and in coooperation with some 1600 independent local telephone companies, provided virtually all interstate telephone service. Competitive entry into interstate common carriage began on a small scale in 1969, when the Commission authorized Microwave Communications, Inc. (now MCI) to construct and operate microwave circuits between Chicago and St. Louis for the provision of point-to-point common carrier service.[6] Throughout the 1970s, the Commission expanded in increments the categories of services subject to competitive entry.[7] Following the D.C. Circuit's Execunet deci-

[5] A list of the parties participating in this proceeding is attached hereto as Appendix A.

[6] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1968), *recon.*, 21 FCC 2d 190 (1970).

[7] *See, e.g., Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *recon.*, 31 FCC 2d 1106 (1971), *aff'd Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975) ("specialized"/private line services); *Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978) (*Resale Decision*).

sion,[8] we opened interstate services generally to competition by the end of the decade.[9]

4. The Commission initiated the *Competitive Carrier* proceeding in 1979 to examine the proper scope of regulation in the new era of competition and, in particular, to consider amendment of the tariff filing requirements for competitive telecommunications common carriers.[10] We proposed to apply different rules to different carriers depending upon the extent of their market power. "Dominant" carriers—primarily AT&T and its then-affiliated Bell Operating Companies—would continue to be subject to full tariff regulation.[11] For the new competitive (or "nondominant") carriers, which lacked market power, we proposed a more light-handed approach.[12]

5. The Commission posited in *Competitive Carrier* that nondominant carriers, precisely because they lacked market power, would be unable to charge unjust and unreasonable rates in violation of Section 201(b) of the Communications Act,[13] or to discriminate unreasonably in violation of Section 202(a) of the Act.[14] We tentatively concluded that, in these circumstances, traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing.[15]

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[8] *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977).

[9] *MTS and WATS Market Structure*, 81 FCC 2d 177 (1980).

[10] *Competitive Carrier Notice*, 77 FCC 2d at 309.

[11] *Id.* at 318-28; *First Report*, 85 FCC 2d at 20-22.

[12] *Competitive Carrier Notice*, 77 FCC 2d at 313-14.

[13] 47 U.S.C. § 201(b).

[14] *Id.* § 202(a); *see Competitive Carrier Notice*, 77 FCC 2d at 334-36.

[15] *Competitive Carrier Notice*, 77 FCC 2d at 313-14, 358-59.

6. As an initial step in the regulatory reform process, we adopted a "streamlined" form of tariff regulation for nondominant carriers, which included reduced notice periods and cost support requirement for tariff filings, and the requirement that parties seeking suspension of such filings overcome a presumption of lawfulness.[16] Concurrently, however, we sought comment on two alternatives to streamlining. Under one option, the Commission would "forbear" from exercising the full range of its Title II regulatory powers, including tariff regulation, while continuing to apply the Act's substantive ratemaking standards contained in Sections 201(b) and 202(a).[17] Under a second, "definitional option," we would find telecommunications providers that lacked market power not to be "common carriers" under the Act,[18] and thus subject to broad deregulation.[19]

7. In the *Second Report*, issued in 1982, we adopted the forbearance option, without ruling on our authority to pursue a definitional approach.[20] Proceeding in a cautious, incremental manner, we applied forbearance first to resale carriers, ordering that such carriers "no longer need adhere to . . . the tariff filing requirements of Section 203."[21] The substantive standards contained in Sections 201(b) and 202(a) thereafter would be enforced against such carriers primarily through the complaint

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[16] *First Report*, 85 FCC 2d at 30-40.

[17] *Competitive Carrier Notice*, 77 FCC 2d at 359-63; *see Competitive Carrier Further Notice*, 84 FCC 2d at 471-91.

[18] *Competitive Carrier Notice*, 77 FCC 2d at 363-68.

[19] *Id.; see Competitive Carrier Further Notice*, 84 FCC 2d at 463-70.

[20] 91 FCC 2d at 61-62 & n.7.

[21] *Id.* at 73.

process under Section 208 of the Act.[22] In 1983, the Commission extended this permissive detariffing treatment to other nondominant carriers, including so-called "specialized carriers" such as MCI and US Sprint,[23] and, a year later, we accorded such treatment to virtually all remaining categories of nondominant carriers.[24]

8. The Commission converted its permissive detariffing rules into a mandatory detariffing requirement for nondominant carriers in 1985.[25] The United States Court of Appeals for the District of Columbia Circuit vacated and remanded that decision, holding that the FCC lacked statutory authority to *prohibit* carriers from filing tariffs.[26] The court, however, explicitly did "not reach the question whether the FCC's earlier permissive orders are invalid," [27] and the permissive detariffing rules have remained a cornerstone of the Commission's regulatory regime since that time.

B. *AT&T's Complaint*

9. On August 7, 1989, AT&T filed a complaint against MCI alleging that MCI was violating Section 203 of the Communications Act by providing interstate telecommunications services to certain large business customers at rates and on terms and conditions not set forth in interstate tariffs.[28] AT&T claimed that, notwithstanding

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[22] 47 U.S.C. § 208; *see Second Report*, 91 FCC 2d at 70-71. We also noted that we could "reimpos[e] . . . the tariff filing requirement" at a later time in the "unlikely event" that the complaint process proved inadequate to that task. *Id.* at 70.

[23] *Fourth Report*, 95 FCC 2d at 578.

[24] *Fifth Report*, 96 FCC 2d at 1191.

[25] *Sixth Report*, 99 FCC 2d at 1020.

[26] *MCI v. FCC*, 765 F.2d at 1192.

[27] *Id.* at 1196.

[28] *See AT&T Communications v. MCI Telecommunications Corp.* (File No. E-89-297), 7 FCC Rcd 807 (1992), *pet. for review pending, AT&T v. FCC*, D.C. Circuit No. 92-1053.

the Commission's permissive detariffing rules, the plain language of Section 203 requires all carriers to file tariffs. In support of this contention, AT&T relied principally upon the D.C. Circuit's 1985 *MCI v. FCC* decision vacating our mandatory detariffing requirement,[29] and on the Supreme Court's subsequent decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[30] addressing the "filed rate" doctrine under the Interstate Commerce Act (ICA).[31]

10. Recognizing that AT&T's complaint was, in effect, an attack on the legality of the *Competitive Carrier* permissive detariffing rules, with potentially important consequences for the entire telecommunications industry, we concluded that the issues AT&T raised should be addressed in a broader rulemaking proceeding rather than a two-party adjudication.[32] We initiated this rulemaking proceeding for that purpose.[33]

III. THE PLEADINGS

11. Of the more than forty parties that responded to the *Notice*, only six parties, led by AT&T, claim that the Commission was without authority to adopt its permissive detariffing rules.[34] These commenters stress that Section 203 of the Communications Act requires that every common carrier file with the Commission schedules showing all charges for itself and showing the classifications, prac-

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[29] 765 F.2d at 1186.

[30] 110 S.Ct. 2759 (1990).

[31] *See AT&T v. MCI*, 7 FCC Rcd at 808, para. 8.

[32] *AT&T v. MCI*, 7 FCC Rcd at 809, paras. 14-17.

[33] *Notice*, 7 FCC Rcd 804; *see also AT&T v. MCI*, 7 FCC Rcd at 809-10, paras. 17-18.

[34] These parties are AT&T, Alascom, Mobile Marine Radio, NYNEX, US West, and USTA.

tices, and regulations affecting such charges.[35] They claim that the "plain language of Section 203" means that the Commission "has no authority" to relieve any carriers, including nondominant carriers, of the obligation to file tariffs.[36] To bolster this construction, they cite various court decisions interpreting Seciton 203 and similar provisions of the Interstate Commerce Act, upon which the Communications Act provisions are generally patterned.[37]

12. Apart from the allegedly mandatory language of Section 203 itself, opponents of the Commission's current rules also claim that forbearance is inconsistent with the statutory scheme as a whole. In particular, they stress that the filing of tariffs provides the Communications Act's "central protection" against unjust, unreasonable, or unreasonably discriminatory rates and practices, and that the Commission may not dispense with that protection, even in a competitive environment.[38]

13. On the other hand, users, nondominant carriers, enhanced service providers, competitive access providers, some local exchange carriers, and others support our current rules. These parties generally dispute claims that the plain language of Section 203 forbids permissive detariffing. They state that the otherwise mandatory language in Section 203(a) that carriers "shall" file tariffs must be read in light of the equally explicit statement in Section 203(b)(2) that the Commission may "modify any requirement made by or under authority of this section," and the provision in Section 203(c) permitting a carrier to offer service without a tariff when "otherwise provided by or under authority of this Act."[39] These parties contend that this express power to modify the tariff filing requirements gives the FCC ample authority to adopt permissive detariffing.[40]

[35] AT&T Comments at 3; *see also* Alascom comments at 3; NYNEX Comments at 6; US West comments at 4-5; USTA Reply Comments at 2-3.

[36] *See, e.g.*, AT&T Comments at 3; USTA Comments at 2-3.

[37] *See, e.g.*, AT&T Comments at 4-7 (citing *MCI v. FCC*, 765 F.2d at 1186; *Maislin*, 110 S.Ct. at 2759; *Resale Decision*, 572 F.2d at 17); US West Comments at 5-7 (citing, in addition, *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973) (*Special Permission Decision*)).

[38] *See, e.g.*, Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

14. Supporters of permissive detariffing also point to repeated instances over the past decade in which Congress has demonstrated its awareness of the Commission's existing rules without attempting to overturn them.[41] They claim, in particular, that the recent enactment of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA),[42] indicates Congressional acquiescence in our interpretation of our forbearance authority.[43] Noting that TOCSIA reimposes limited tariffing requirements on some nondominant carriers—*i.e.*, operator service providers—these commenters contend that the legislation was "clearly founded on a baseline of forbearance for other nondominant carriers' services,"[44] without disturbing that baseline.[45]

[39] *See, e.g.*, Ad Hoc Comments at 7-10; FEMC Comments at 3-6; OCOM Comments at 9-12; MCI Comments at 6-7, 14-18.

[40] *See, e.g.*, Comptel Comments at 2-5, 7-9; MCI Comments at 8-14; CTIA Comments at 11-14.

[41] *See, e.g.*, MCI Comments at 25-45; Comptel Comments at 9-14; Comptel Reply Comments at 6-8.

[42] P.L. 101-435 (codified at 47 U.S.C. § 226 (West Supp. 1990)).

[43] *See, e.g.*, Ad Hoc Comments at 10-13; Comptel Comments at 9-11; FEMC Comments at 8-12; OCOM Comments at 5-7; IBM Comments at 4-6.

[44] *See, e.g.*, Ad Hoc Comments at 12 n.9; *see also* Comptel Comments at 9-12; FEMC Comments at 9-12; OCOM Comments at 5-7; MCI Comments at 34-35; IBM Comments at 5-6.

[45] *See* CTIA Comments at 15-16 (quoting 47 U.S.C. § 226(i) ("Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act.")).

IV. DISCUSSION

15. Upon consideration of the record developed in this proceeding and our analysis of the law, we conclude that, in light of the language of Section 203, the Commission may lawfully permit nondominant carriers not to file tariffs. We also find that our conclusion in the *Competitive Carrier* decisions—that permissive detariffing furthers the purposes of the Communications Act and meets the substantive requirements of Sections 201(b) and 202(a), which require that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory—is still valid given the growth and development of the interexchange market.[46] Consequently, we conclude that our forbearance rules that permit nondominant carriers not to file tariffs are both lawful and desirable as serving the public interest.

A. *Permissive Detariffing Is Lawful Under the Communications Act*

1. *The "Plain Language" of the Act Allows Permissive Detariffing*

16. Opponents of the Commission's permissive detariffing rules claim that the plain language of Section 203 requires tariff filings by all carriers and, thus, that the Commission lacks the power to relieve carriers of this requirement, regardless of whether tariffs otherwise serve the broader purposes of the Act.[47] Section 203 of the Communications Act provides, in pertinent part:

> (a) Every common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission . . . schedules showing all charges for itself . . . and showing the classifications,

[46] *See Second Report*, 91 FCC 2d at 71; *Competitive Carrier Further Notice*, 84 FCC 2d at 478-84.

[47] *See, e.g.*, AT&T Comments at 2-3; US West Comments at 6.

> practices, and regulations affecting such charges. . . . (b)(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice specified in paragraph (1) to be more than one hundred and twenty days.
>
> (c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless such schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation, for such communications, or for any service in connection therewith . . . than the charges specified in the schedule then in effect. . . .

17. Although the language of Section 203(a) and 203(c) states that "every" common carrier "shall" file tariffs and "no carrier . . . shall engage or participate in such communication unless schedules have been filed and published . . .," [48] we find that other language within Section 203 limits those commands. Specifically, under Section 203(b)(2) the Commission is granted equally explicit authority to "modify *any requirement*"—save one—"made or under authority of this section." [49] By its terms, Section 203(b)(2) limits the Commission's modification power in one circumstance only—the FCC "may not" expand the 120-day period notice period for tariff filings prescribed in Section 203(b)(1). We believe that this

[48] *See MCI v. FCC*, 765 F.2d at 1191 ("'Shall' . . . is the language of command, [and] . . . [a]bsent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive.") (internal quotations omitted).

[49] 47 U.S.C. § 203(b) (emphasis added).

specific, narrow limitation on the Commission's modification power strongly suggests that Congress did not otherwise intend to limit our authority, upon a proper public interest showing, to alter the requirements of Section 203. As we noted in *Competitive Carrier*, "[t]he words 'this section' clearly refer to the entire Section 203. When Congress wished to identify subsections, it used the word 'subsection' or 'paragraph' (followed by the letter or number) throughout the Act. *See, e.g.*, Sections 204, 213." [50] Thus, this modification power may be employed to alter the tariff filing requirements of both subsections (a) and (c) of Section 203.

18. Similarly, Section 203(c)'s prohibition against providing service without a tariff applies "*unless otherwise provided* by or *under authority of this Act.*" [51] In *Competitive Carrier*, we noted that Section 203(b)(2) may be construed as the authority referenced in 203(c).[52] We find no evidence that Congress intended that the Section 203(b) power to modify the requirements prescribed under Sections 203(a) and 203(c) be limited to particular requirements except the requirements explicitly mentioned (the 120-day notice period). We agree with those parties that assert that without specific limitations upon the Commission's authority, Congress intended for the FCC to have broad powers that could be exercised as the public interest requires.[53] Consequently, we find that Section 203 permits the FCC to exercise its authority under Section 203(b) in order to alter the tariff filing requirements of both subsections (a) and (c) of Section 203 as long as the FCC demonstrates that the goals of the Communications Act will be met and that the public

[50] *Competitive Carrier Further Notice*, 84 FCC 2d at 480 n.69.

[51] 47 U.S.C. § 203(c) (emphasis added).

[52] *See* 84 FCC 2d at 481.

[53] *See, e.g.*, IBM Comments at 2; GTE Comments at 12; MCI Comments at 21.

interest would be served thereby.[54] We therefore reaffirm our conclusion in *Competitive Carrier* that these provisions defeat any claim that permissive detariffing is facially inconsistent with Section 203.[55]

19. Nor do the cases cited in support of the "plain language" construction alter our analysis. In *MCI v. FCC*, the court held that our Section 203(b) authority to "modify" tariffing requirements did not permit the Commission to convert the statutory command that carriers "*shall*" file tariffs into a requirement that carriers

[54] Moreover, in the absence of any explicit statutory prohibition, Section 4(i) of the Act, 47 U.S.C. § 154(i), provides additional authority for forbearance. *See, e.g., New England Tele. & Tel. v. FOC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 109 S.Ct. 1942 (1989) ("section 4(i) is a 'necessary and proper clause' empowering the Commission to 'deal with the unforeseen . . . to the extent necessary to regulate effectively those matters already within the boundaries' ") (*quoting North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)). It has long been recognized that the FCC, as the expert agency, has ample discretion in this dynamic field of communications. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); (the Communications Act is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy"); *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1256 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1974). Absent explicit statutory direction, we have well-established discretion in choosing how to regulate, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138; *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 218-19 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73, 180-81 (1968); *CCIA v. FCC*, 693 F.2d at 212, including the discretion "not to exercise particular authority which . . . has been granted." *NARUC v. FCC*, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976). Because the Commission continues to ensure that the substantive requirements of the Act are met, it is free to exercise its discretion. *Cf. FPC v. Texaco*, 417 U.S. 380 (1974) (indirect regulation of small natural gas producers' rates is permissible so long as the FPC properly applies the Act's substantive standards to those rates).

[55] *Second Report*, 91 FCC 2d at 71; *see Competitive Carrier Further Notice*, 84 FCC 2d at 478-84.

shall not do so. The petitioner in that case was a nondominant carrier that wished to file tariffs and that asserted, among other things, that the Commission's decision to prevent it from doing so would cause it harm.[56] The court stated that in such a context, Section 203(b) did not justify the "wholesale abandonment or elimination" of tariff filings.[57] The court, however, did not—and in light of other precedent permitting tariff forbearance in limited contexts,[58] could not—find the Section 203 facially precluded permissive detariffing. Indeed, the court in *MCI v. FCC* noted that our permissive detariffing rules were "fundamentally" different from those it struck down, and it expressly did "not reach the question whether [those] . . . permissive orders are invalid."[59]

20. Similarly, the Supreme Court's decision in *Maislin* also is not dispositive here.[60] The Court held in that case that the Interstate Commerce Commission (ICC) could not "relieve a shipper of the obligation of paying the filed rate when the shipper and carrier ha[d] privately negotiated a lower rate."[61] That core holding simply re-

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[56] *See MCI v. FCC*, D.C. Circuit No. 85-1030, Brief of MCI, filed April 1, 1985, at 59-60; *id.* Reply Brief of MCI, filed May 15, 1985, at 26-27. In fact, the court in *MCI v. FCC* suggested that the *only* statutory interest properly raised in that case was the interest of the nondominant carrier in being *permitted* to file tariffs. The court noted that "[o]nly when the Commission turned permission into command [in the *Sixth Report*] did MCI's aggrievement become evident and plainly adequate to support a challenge" to the Commission's action. *MCI v. FCC*, 765 F.2d at 1190.

[57] 765 F.2d at 1192.

[58] *See infra* Section IV.A.2.

[59] *MCI v. FCC*, 765 F.2d at 1190, 1196. *See Richman Bros. Records v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1436 (3rd Cir. 1991) (*MCI v. FCC* did not address lawfulness of permissive detariffing).

[60] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

[61] 110 S. Ct. at 2762.

affirms the "filed rate doctrine," which courts previously have applied in Communications Act cases as well.[62] By contrast, our forbearance rules allowing permissive detariffing are consistent with that long-established doctrine.[63]

21. Moreover, we note that the specific motor common carrier tariff filing provisions at issue in *Maislin* facially differ in important respects from Section 203 of the Communications Act. In particular, the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the "requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority contained in Section 203(b) applies, by its terms, to both the obligation to file tariffs (Section 203(a)) and the prohibition against untariffed offerings (Section 203(c)).

22. In addition, although Section 10761(a)'s requirement (like that in Section 203(c) is applicable "[e]xcept as provided in this subtitle," the *Maislin* Court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the require-

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[62] *See, e.g., American Broadcasting Cos. v. FCC*, 643 F.2d 818, 819 (D.C. Cir. 1980).

[63] *See Competitive Carrier Further Notice*, 84 FCC 2d at 483-84; *Certified Collateral Corp. v. Allnet Communications Servs., Inc.*, 2 FCC Rcd 2171, 2174 n.13 (Com. Car. Bur. 1987).

ments of Section 10761(a),[64] thus "demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." [65] Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.[66]

23. Furthermore, we stress that courts have recognized that while there are "similarities" between the Interstate Commerce Act (ICA) and the Communications Act, the FCC should not be "restrict[ed] . . . to a course of action that has been dictated by the requirements of the transportation industry." [67] For instance, in holding that the FCC's authority to modify tariff notice periods was greater than that accorded the ICC under former Section 6(3) of the ICA, the Second Circuit stressed that Section 203 of the Communications Act, in particular, is "not . . . a carbon copy of the Interstate Commerce Act." [68]

24. We also find that the *Special Permission Decision*, in which the Second Circuit stated that Section 203(b) authorized modifications only "as to the form of, and information contained in, tariffs," does not alter our analysis.[69] Not only was such language *dicta*, but like the mandatory detariffing at issue in *MCI v. FCC*, and unlike the permissive detariffing rules at issue here, the "special permission" requirement in that case had the effect of *pro-*

[64] *See* 49 U.S.C. § 10761(b).

[65] 110 S. Ct. at 2771 (emphasis in original).

[66] *See infra* paragraphs 30-34.

[67] *General Telephone Co. of the Southwest v. U.S.*, 449 F.2d 846, 856 (5th Cir. 1971).

[68] *AT&T v. FCC*, 503 F.2d 612, 616, 617 (2d Cir. 1974).

[69] 487 F.2d 865, 879 (2d Cir. 1973).

hibiting AT&T from filing tariffs.[70] The court there explained that there had been "[n]othing in Section 203(b) to justify such procedure . . . [which] was in effect a rate "prescription" and inconsistent with 47 U.S.C. § 205, which authorizes rate prescriptions only after a full hearing and specific findings." [71] Since Section 203(b), by its terms, grants the Commission authority to modify only the requirements of Section 203 itself, the Court understandably found that it did not justify a procedure that conflicted with another section of the Act.

25. Similarly, we do not find the Second Circuit's *Resale Decision* controlling. In that case, the court upheld the Commission's discretion in its administration and interpretation of the Communications Act.[72] While the FCC at that time determined not to forbear completely from Title II regulation of resale carriers, it noted in its order on review that "[l]ater experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly." [73] The Commission has subsequently reconsidered the issue of forbearance in its *Competitive Carrier* decision,[74] and concluded that permissive detariffing, combined with enforcement of Title II substantive standards through the complaint process, was lawful and in the public interest.[75]

[70] *See* 503 F.2d at 617.

[71] *Id.*

[72] *Resale Decision*, 572 F.2d at 25.

[73] *Resale and Shared Use of Common Carrier Service*, 60 FCC 2d 261, 308 (1976).

[74] *See Competitive Carrier Notice*, 77 FCC 2d at 360-61.

[75] *Second Report*, 91 FCC 2d at 70-71, 73. Indeed as the D.C. Circuit held in *Geller v. FCC*, 610 F.2d 973, 978-81 (D.C. Cir. 1979), our "public interest" mandate requires us to reexamine and adjust our regulations—as we did in *Competitive Carrier*—in light of changed circumstances. As stated in the *Fourth Report*, the Commission generally has the "duty to determine that its rules

Particularly because statutes governing administrative action may be susceptible of more than one valid interpretration,[76] the Second Circuit's decision to uphold the Commission's own interpretation of its authority in the different context of the *Resale Decision* provides no support for a facial challenge to our permissive detariffing rules here.

26. Significantly, the opponents' absolutist challenge premised upon the alleged "plain language" of Section 203 proves too much. If there were any merit to their argument, the Commission presumably would be without authority to relieve carriers of the obligations to file tariffs for their interstate common carrier services under *any* circumstances. That clearly is not the case, however. Courts on several occasions have recognized our power to forbear from requiring the filing of federal tariffs for interstate common carrier services in other contexts.

27. For example, in *Diamond International Corp. v. FCC*,[77] the court upheld the Commission's refusal to disturb the charges for certain *intra*state common carrier services that New York Telephone Company had included in its *intra*state, rather than interstate tariff. Although the complaining customer in that case argued that Section 203 of the Communications Act required the disputed charges to be included in interstate tariffs,[78] the

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promote the public interest when applied to particular carriers or applicants, and to refrain from imposing and to remove unnecessary regulatory burdens on carriers." *Fourth Report*, 95 FCC 2d at 580.

[76] *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079-90 (D.C. Cir. 1987) (en banc), *cert. denied*, 485 U.S. 913 (1988); *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

[77] 627 F.2d 489 (D.C. Cir. 1980).

[78] *Id.* at 490.

court upheld the Commission's decision to defer to state regulation of the service in the absence of any unreasonable burden on interstate communication.[79] Similarly, in *CCIA v. FCC*,[80] the D.C. Circuit upheld the Commission's decision to forbear from all Title II regulation—including tariff regulation—of certain enhanced services and customer premises equipment that otherwise would be subject to such common carrier regulation, where the Commission found that the "difficulty in isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation." [81] In fact, the court stated: "To the extent that certain enhanced services could lawfully be regulated under Title II once they were identified as common carrier services, we sanction the Commission's forbearance from Title II regulation." [82] We believe that these cases indicate that Section 203 does confer some discretion upon the FCC in determining how to apply that section so that the public interest is served.[83]

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[79] *Id.* at 493. *See also New York Telephone Company v. FCC*, 631 F.2d 1059, 1067 (2d Cir. 1980) (noting that Commission may permit state, rather than federal, tariffing of interstate component of mixed interstate/intrastate service if state regulation does not discriminate against interstate customers).

[80] *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (*CCIA v. FCC*).

[81] *CCIA v. FCC*, 693 F.2d at 211.

[82] *Id.* at 210. We recognize that the Commission asserted, as the primary ground for its decision not to apply Title II regulation to enhanced services and CPE, that the offerings were not "common carrier" services at all. The court explicitly held, however, that the Commission's action was "sustainable on either of the grounds asserted by the Commission." *Id.* at 209.

[83] For other instances in which the Commission declined in its discretion from regulating facilities and services, see our orders cited in the *Second Report*, 91 FCC 2d at 66-67.

2. *Congress has Acquiesced In Permissive Detariffing.*

28. As demonstrated above, we believe that Section 203 can be read to permit the FCC to adopt forbearance rules when the public interest so requires. We recognize, however, the contentions of some of the parties that Congress could not have foreseen the development of nondominant carriers and thus did not address the precise issue.[84] Given that Section 203 was enacted long before a competitive long distance market was even foreseeable, we agree that it is reasonable to conclude that Congress lacked any specific intention regarding the regulatory treatment of nondominant carriers. Section 203 tariff filing requirements were enacted in the context of a monopoly telephone market in order to protect the public from the unlawful rates and practices of the monopoly carrier that exercised unchecked market power. There is no indication that Congress ever considered at the time it enacted Section 203 whether carriers that lacked such market power should also be subject to the full tariff filing requirements of Sections 203(a) and 203(c) if it did not serve the public interest. In tailoring our tariffing policies to the onset of competition in telecommunications, therefore, we have addressed, as we may, circumstances not dealt with directly in the organic statute.[85]

29. Nevertheless, we find that since the time it enacted Section 203, Congress has acquiesced in the FCC's present forbearance rules. We believe these manifestations of legislative intent provide additional support for our conclusion that we have authority to adopt permissible detariffing rules.

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[84] *See, e.g.*, CTIA Comments at 18 n.16; OCCM Comments at 16-17.

[85] *See U.S. v. Southwestern Cable Co.*, 392 U.S. at 172-73; *NARUC v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

30. Most significantly, in its recent enactment of the TOCSIA, Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it.[86] That amendment to the Communications Act requires, *inter alia,* that operator service providers (OSPs), which are common carriers, file "informational tariffs." [87] TOCSIA also authorizes the Commission to waive the filing requirement after four years if it finds that consumers are benefitting from competition to meet statutory objectives.[88]

31. TOCSIA's legislative history makes clear that Congress was aware of the Commission's permissible detariffing rule with respect to nondominant carriers, and that it statutorily modified our authority to forego requiring tariffs for a small subset of common carrier services—involving OSPs—while leaving the existing regulatory baseline intact. First, the committee reports specifically note that many OSPs were considered to be "nondominant" under our *Competitive Carrier* rules and that we had "chosen to 'forbear' " from full Title II regulation of those carriers.[89]

32. Second, the required informational tariffs substantially overlap in scope and purpose the tariff filings provided for in Section 203. Section 226(h)(1)(A) provides that OSPs "shall file . . . an informational tariff specifying rates, terms, and conditions" for operator serv-

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[86] 47 U.S.C. § 226.

[87] *Id.* § 226(h).

[88] *See* 47 U.S.C. § 226(h)(1)(B); 47 U.S.C. §§ 226(d)(1)(A) & (B); S. Rept. No. 101-439, Senate Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess., at 23 (August 30, 1990).

[89] S. Rept. No. 101-439, Senate Committee on Commerce Science, and Transportation, 101st Cong., 2d Sess., at 3 & n.10 (August 30, 1990); *see also* H. Rept. No. 101-213, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 3, 5-6 (August 3, 1989).

ices.[90] Congress explained that "[t]his tariff filing requirement is intended to allow members of the public and the FCC to review and, if necessary, investigate these carriers' rates."[91] This informational tariff requirement would be mere surplusage if Congress believed that the FCC had incorrectly interpreted Section 203 as allowing permissive detariffing.[92] In this regard, we find it noteworthy that virtually at the same time Congress enacted TOCSIA, it also amended Section 203 itself.[93] Although Congress was well aware of the Commission's permissive detariffing rules at that time, as evidenced by the contemporaneous TOCSIA legislative history, Congress made no attempt to disturb the Commission's interpretation of its authority under Section 203.

33. Finally, in permitting waiver of the informational tariffing requirement after four years, Congress in effect

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[90] *Cf.* 47 U.S.C. § 203(a) (requiring that tariffs include "charges" and "classifications, practices, and regulations affecting such charges").

[91] S. Rept. No. 101-439, at 23.

[92] Although the informational tariffs required by Section 226(h) must include certain data—*e.g.*, "reasonable estimates of the amount of traffic priced at each rate"—that are not specifically required by Section 203, Congress also made clear that "these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers." S. Rept. 101-439, at 9. *See also* H. Rept. No. 101-213, at 14. Thus, we reject AT&T's contention that the informational tariff filing requirement in Section 226(h) was intended as a *supplemental* requirement (in addition to Section 203 requirements) for OSPs, rather than a substitute for the Section 203 filings that Congress recognized we could excuse. *See* AT&T Reply Comments at 15 & n.*.

[93] *See* Pub. Law 101-396 (approved September 28, 1990) (increasing the notice period (from 90 to 120 days) for tariff filings); *see also* H. Rept. No. 101-316, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 7-8 (Oct. 27, 1989) (expressing Congress' sentiment that the increased notice period should be used only for local exchange carriers' annual access tariff filings).

recognized and approved the rationale upon which the Commission based its forbearance regime generally. Congress noted that "[i]f the other provisions of this bill have a positive effect in promoting competitive rates and services, . . . the need for these tariff[] filings diminishes."[94] Under these circumstances, we believe that it is fair to assume that Congress has, at the very least, acquiesced in the Commission's construction of its authority to forbear from requiring nondominant carriers to file tariffs under Section 203 of the Communications Act.

34. Therefore, while we recognize that courts may be reluctant to infer Congressional approval of an agency's interpretation of its organic statute based solely upon Congressional inaction,[95] Congress' record over the past decade since we adopted our permissive detariffing rules displays far more than unknowing silence with respect to those rules. Congress has repeatedly acted in the telecommunications area over the past decade that the Commission's policy was in effect and failed to alter or repeal this fundamental policy.[96] Thus, we conclude that the enactment of TOCSIA, which is predicated upon a baseline of forbearance, as well as the failure of Congress to express its reservations about our forbearance rules, supports the interpretation of our authority that we adopted in *Competitive Carrier*.[97]

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[94] S. Rep. No. 101-439, at 23.

[95] *See, e.g., Demarest v. Manspeaker*, 111 S. Ct. 599, 603-04 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983).

[96] *See, e.g.*, H.R. Rep. No. 96-1252, 96th Cong., 2d Sess., pt. 2 at 1 (1980); H.R. 5158, 97th Cong, 2d Sess. (1981) (Telecommunications Act of 1982); H.R. Conf. Rpt. No. 765, 97th Cong., 2d Sess. 56 (1982); FCC Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (1989); H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3 (1989). *See also* MCI Comments at 25-35; CompTel Comments at 9-13.

[97] Courts have often held that where Congress is aware of an agency's interpretation and has not sought to alter it despite mak-

B. *Permissive Detariffing Advances the Purposes of the Communications Act*

35. On the basis of our thorough review of permissive detariffing in the *Competitive Carrier* decisions and the record in this proceeding, we continue to believe that our forbearance policy furthers the statutory purposes of the Communications Act. The fundamental statutory purpose contained in Section 1 of the Act is "to make available . . . to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . . ."[98] As the Commission recognized in *Competitive Carrier*, the tariff filing procedures set forth in Section 203 of the Communications Act were designed principally to facilitate enforcement of the substantive requirements, contained in Sections 201(b) and 202(a), that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory.[99] In implementing permissive detariffing, we sought to adapt our regulation of telecommunications common carriers to the changed circumstances of competition and to develop a regulatory approach that furthers the purposes of the Act while fostering innovation and the efficient development of the telecommunications industry.[100] We did not discard the standards of Section 201(b) or 202(a), but rather com-

ing other amendments to the statute, it can be presumed that legislative intent has been correctly discerned. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 137 1985); *Bob Jones University v. U.S.*, 461 U.S. 574, 599-602 (1983); *New Haven Board of Educations v. Bell*, 456 U.S. 512, 533-35 (1982); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

[98] 47 U.S.C. § 151; *see Second Report*, 91 FCC 2d at 64.

[99] *Second Report*, 91 FCC 2d at 71; *Competitive Carrier Further Notice*, 84 FCC 2d at 483.

[100] *Second Report*, 91 FCC 2d at 60, 62.

mitted to enforcing them through the complaint process in the event that "irrational carrier conduct or aberrations" occur.[101]

36. In the *Competitive Carrier* decisions, we further concluded the mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends.[102] We found that in the case of nondominant carriers, which by definition lack substantial market power, such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs. We held that, consequently, the users would pay higher rates and that the services available to meet the needs of users would be limited.[103] Moreover, we additionally held that by allowing permissive detariffing, the risk of collusive pricing would be diminished.[104]

37. We conclude that mandatory tariff filing requirements continue to be unnecessary for nondominant interexchange carriers (IXCs) because they continue to lack market power. If such carriers sought to charge unreasonable rates in violation of Section 201(b) or to discriminate unreasonably in violation of Section 202(a), customers would simply move to other carriers.[105] We agree with those parties stating that the competitive forces in the marketplace serve to ensure, in the first instance, carrier compliance with the obligations imposed by

[101] *Id.* at 70; *see* 47 U.S.C. § 208.

[102] *Second Report*, 91 FCC 2d at 62, 65, 71 *Competitive Carrier Further Notice*, 84 FCC 2d at 453, 456, 471, 479.

[103] *Fourth Report*, 95 FCC 2d at 580.

[104] *Id.* at 556.

[105] *See First Report*, 85 FCC 2d at 31; *Second Report*, 91 FCC 2d at 69.

Sections 201(b) and 202(a).[106] While some commenters argue that the FCC's forbearance policy alters the statutory scheme envisioned by Congress by making it difficult or impossible to ensure that nondominant carriers comply with the Act's substantive requirements that rates be just, reasonable, and not unreasonably discriminatory, we disagree given the competitive evolution of the industry.[107] Further, we note that the complaint process under Section 208 remains available in the event allegations of unjust or unreasonable rates are made.[108] Significantly, we emphasize that if competitive forces fail to ensure carrier compliance with the obligations imposed by Sections 201(b) and 202(a), we will rely not only upon our complaint process but also upon our ability to reimpose tariff-filing requirements as necessary to protect the public from unjust or unreasonable rates charged by carriers operating under permissive detariffing.[109]

38. We also continue to believe that altering our forbearance policy would frustrate the overriding goals of the Act.[110] We agree with those commenters that argue

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[106] *See, e.g.*, RCI Long Distance Comments at 2 (market forces are sufficient to guarantee that rates and practices will be reasonable, because dissatisfied customers can simply and inexpensively pick another carrier); OCOM Comments at 17-18 (the lack of market power by [nondominant carriers] assumes that the public will be afforded the just and reasonable rates required under . . . the Act by ensuring a competitive environment in which pricing is determined by market forces); *see also Second Report*, 91 FCC 2d at 61; *Further Notice*, 84 FCC 2d at 495.

[107] *See, e.g.*, Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

[108] 47 U.S.C. § 208. Significantly, under our rules, any party filing a complaint under Section 208 is entitled to discovery in order to ascertain pertinent information regarding carriers' rates and practices. *See* 47 C.F.R. §§ 1.729-1.730 (1992).

[109] *See Fourth Report*, 95 FCC 2d at 579-80.

[110] *See, e.g.*, NTCA Comments at 2-3; GTE Comments at 9-10; *see also Second Report*, 91 FCC 2d at 60-61; *Fourth Report*, 95

that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market.[111] We agree with those parties that assert that the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted.[112] Moreover, the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all.[113]

39. We conclude that permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices.[114]

FCC 2d at 555. We concluded in the *Fourth Report* that applying Section 203(a) requirements to nondominant carriers thwarts the goals of the Act by fostering inefficiencies and imposing costs on carriers and consumers without offsetting benefits to consumers. *Fourth Report*, 95 FCC 2d at 555, 557.

[111] *See, e.g.*, RCI Long Distance Comments at 1-2 (tariff process provides a disincentive for innovation and inhibits price competition); *see also* OCOM Comments at 1-2; TCA Comments at 5.

[112] *See, e.g.*, CompTel Comments at 5-6; AOC Long Distance Comments at 4; Ad Hoc Comments at 3-5; Commonwealth Long Distance Comments at 1-3, 5-6; ICA Comments at 2; OCOM Comments at 1-2; RCI Long Distance Comments at 1-2.

[113] *See. e.g.*,. Interexchange Resellers Association Comments at 1-2; LOCATE Comments at 7-8; TCA Comments at 5-6; RCI Long Distance (new IXCs can enter niche markets for interstate services without costly filings and lengthy regulatory delays); OCOM Comments at 8 (many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure).

[114] Based upon the past decade of growth and competition in the interexchange market, we disagree with those commenters that contend that the current application of the forbearance doctrine

The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Communications Act.[115] In 1982, approximately a dozen long distance carriers operated within the United States.[116] By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers.[117] Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of service, type of services, and selection of carriers.[118] To adopt a different course of action at this time would only frustrate the success of our current policy.

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creates artificial competition because some but not all participants must file tariffs with cost support. *See, e.g.*, PacTel Comments at 2; NYNEX Comments at 13; Alascom Comments at 4-5.

[115] Indeed, in the *Interexchange Order*, we concluded based upon the extensive record in that proceeding, that competition had flourished under the market analysis set forth in the *Competitive Carrier* decisions. *See Competition* in the Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5881-82 (*Interexchange Order*). *Cf. American Airlines, Inc. v. CAB*, 359 F.2d 624, 633-34 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966).

[116] *See Trends in Telephone Service*, Industry Analysis Divison, Common Carrier Bureau, FCC, at 30 & Table 19 (February 1992).

[117] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 6 & Table 1 (June 16, 1992).

[118] While AT&T states that the Commission already has developed streamlined tariffing procedures in the *First Report* that would not overburden nondominant IXCs and that fully complies with Section 203, we believe that the public interest is better served by allowing permissive detariffing of those carriers that lack substantial market power. AT&T Comments at 8. As we stressed in the *Fourth Report*, forbearance "eliminates a potential vehicle for collusive conduct and facilitates price discounting" and, therefore, serves the public interest better than streamlined regulation. *Fourth Report*, 95 FCC 2d at 556 n.3.

40. Moreover, since 1984, overall interstate calling has grown at an annual rate of about 12%, with carriers other than AT&T posting an average annual growth rate in excess of 25%.[119] During the same period between January 1984 and January 1992, AT&T's share in terms of minutes of the interstate market declined from over 80% to just more than 60%,[120] while its rates for directly dialed interstate have also fallen substantially.[121] Several of AT&T's nondominant competitors have engaged in intensive capital investment programs to develop state-of-the-art fiber optic networks, and AT&T now has less than half of the long distance industry's fiber optic route miles.[122] Thus, in light of the successful practical experience with permissive detariffing, we believe not only that this policy advances the broad purposes of the Communications Act and is therefore in the public interest, but also that it would be unreasonable to disturb our current rules in the absence of Congressional or judicial commands.

C. *Additional Matters*

41. In its complaint against MCI that precipitated this rulemaking, AT&T claimed that the permissive detariffing rules we adopted in *Competitive Carrier* were not substantive rules that relieved nondominant carriers of the obligation to file tariffs, but rather an exercise of the Commission's discretion not to enforce the requirements

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[119] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 34 (September 1992).

[120] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 4 & Table 3 (October 1992). With respect to "high end" business services, AT&T's current market share appears closer to 50%. *See Interexchange Order*, 6 FCC Rcd at 5890.

[121] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 13 (February 1992).

[122] *See Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2633-34 (1990).

Section 203. In our order resolving that complaint we explained that our permissive detariffing policy was, in fact, a binding substantive rule that removed the tariff filing requirement from nondominant carriers.[123] Having decided here to reaffirm our uncodified forbearance rule, and in order to remove any possible ambiguity on that issue, we codify the permissive detariffing rule.[124]

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

42. *Need and purpose of this action.* This rulemaking proceeding was initiated to review the continuing lawfulness of the Commission's existing permissive detariffing rules in light of a complaint filed by AT&T alleging, in effect, that these rules violate the Communications Act. This order sustains those rules as being consistent with the Act and the public interest.

43. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Act Analysis.* The Initial Regulatory Flexibility Analysis stated that any change in exising rules could have a significant impact on a broad range of telecommunications common carriers. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

44. *Significant alternatives considered and rejected.* The *Notice* did not propose new rules or alternative policies, but sought comment on the lawfulness of our existing permissive detariffing rules and on how they should be changed in the event they are found unlawful. This item reaffirms and codifies our existing rules which minimize regulatory burdens on nondominant carriers.

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[123] *AT&T v. MCI*, 7 FCC Rcd at 809, para. 13.

[124] *See* Appendix B.

VI. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4, and 201-05 of the Communications Act of 1934, amended, 47 U.S.C. §§ 151, 154 and 201-05, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, IS AMENDED as set forth in Appendix B.

46. IT IS FURTHER ORDERED, that the policies and rules set forth herein ARE ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

DONNA R. SEARCY
Secretary

APPENDIX A: PARTIES FILING COMMENTS

Comments

ACC Long Distance Corp. (ACC)
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Association for Local Telecomunications Services
Automated Communications, Inc., *et al.*
Cellular Telecommunications Industry Association
Commonwealth Long Distance Company
Communications Transmission, Inc.
Competitive Telecommunications Association
Fairchild Communications Services Company
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Interexchange Resellers Association
International Business Machines Corporation (IBM)
International Communications Association (ICA)
KIN Network Access Division
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
Mobile Marine Radio, Inc.
National Telephone Cooperative Association (NTCA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Pacific Telesis Group (PacTel)
RCI Long Distance, Inc. (RCI Long Distance)
Southwestern Bell Corporation
Sprint Communications Company L.P.
Tele-Communications Association (TCA)
Telecommunications Marketing Association
Telocator
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

Reply Comments

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc.
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Centel Cellular Corp.
Communications Transmission, Inc.
Competitive Telecommunications Association
Custom Network Services
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Information Technology Association of America (ITAA)
International Communications Association (ICA)
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
McCaw Cellular Communications
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
National Telecommunications and Information Association (NTIA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Southwesten Bell Corporation
Sprint Communications Company L.P.
Telecommunications Marketing Association
Telocator
United States Telephone Association (USTA)
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

APPENDIX B: RULE CHANGES

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 61 continues to read:

AUTHORITY: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. § 203.

2. Part 61 is amended by adding Section 61.50 as follows:

§ 61.50 Carriers Subject to Forbearance

Notwithstanding the rules set forth herein, no domestic carrier classified as nondominant that is subject to forbearance is required to file tariffs.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 1992

Decided November 13, 1992

No. 92-1053

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

US SPRINT COMMUNICATIONS COMPANY,
US WEST COMMUNICATIONS, INC.,
AMERITECH OPERATING COMPANIES,
MCI TELECOMMUNICATIONS CORPORATION,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
AD HOC TELECOMMUNICATIONS USERS COMMITTEE,
Intervenors

Petition for Review of an Order of the
Federal Communications Commission

David W. Carpenter, with whom *Peter D. Keisler*, *Francine J. Berry*, and *Mark C. Rosenblum* were on the brief, for petitioner.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, with whom *Robert L. Pettit*, General Counsel, Federal Communications Com-

mission, *Laurence N. Bourne,* Counsel, Federal Communications Commission, *Catherine G. O'Sullivan* and *Robert J. Wiggers,* Attorneys, Department of Justice, were on the brief, for respondents.

Frank W. Krogh, Donald J. Elardo, Loretta J. Garcia, and *Richard M. Singer* were on the brief for intervenor MCI Telecommunications Corporation.

James S. Blaszak and *Patrick J. Whittle* were on the brief for intervenor Ad Hoc Telecommunications Users Committee.

Leon M. Kestenbaum, H. Richard Juhnke, and *Michael B. Fingerhut* entered appearances for intervenor US Sprint Communications Company.

Robert B. McKenna and *Lawrence E. Sarjeant* entered appearances for intervenor US WEST Communications, Inc.

Alfred Winchell Whittaker and *Floyd S. Keene* entered appearances for intervenor Ameritech Operating Companies.

J. Roger Wollenberg, William T. Lake and *Jonathan Jacob Nadler* entered appearances for intervenor International Business Machines Corporation.

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: AT&T petitions for review of an order of the Federal Communications Commission that concluded an investigation into a complaint filed by AT&T in 1989. The complaint alleged that MCI had violated and was continuing to violate section 203 of the Communications Act, 47 U.S.C. § 203 (1988), by charging some customers rates that were not filed with the FCC. The Commission denied AT&T's complaint in part

and dismissed it in part without determining whether MCI had violated the Act and ostensibly without addressing the validity of the Commission's *Fourth Report and Order,* 95 F.C.C.2d 554 (1983), on which MCI had relied to justify its actions. The FCC said that it would postpone reconsideration of the validity of the *Report* to a rulemaking that it announced at the same time it denied AT&T relief. We hold that it was arbitrary and capricious for the agency to dismiss AT&T's complaint for immediate relief without deciding the question of law it presented. Moreover, we think that in dismissing the complaint the FCC necessarily, if implicitly, assumed the validity of the *Fourth Report* as a substantive rule. And under our precedent the rule is plainly contrary to section 203. We remand to the Commission for it to reconsider the appropriate relief it should grant to AT&T.

I.

Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988), requires that every communications common carrier file its rates with the FCC.[1] AT&T's dispute with MCI and the FCC involves "permissive detariffing," a term used to refer to the FCC's decision to forbear from enforcing the rate filing requirement of section 203 against carriers, including MCI, that the FCC determined to be nondominant in the interexchange market (presumably AT&T remains the only "dominant" car-

[1] 47 U.S.C. § 203(a) states: "Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate . . . communication. . . ."

47 U.S.C. 203(b)(2) states:

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions. . . .

rier in the FCC's view).[2] Permissive detariffing's genesis is found in the *Competitive Carrier* proceeding the FCC initiated in 1979 to determine methods for reducing the regulatory burdens on communications common carriers. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d 308 (1979). In 1982 in its *Second Report and Order,* the Commission decided that it would forbear from enforcing section 203(a)'s filing requirements against nondominant resale carriers. *See Second Report and Order,* 91 F.C.C.2d 59, 71 (1982). And in its 1983 *Fourth Report and Order,* the Commission extended the policy of forbearance (in other words, permissive detariffing treatment) to "specialized carriers" such as MCI. *See Fourth Report and Order,* 95 F.C.C.2d 554, 578 (1983).

The Commission, however, went beyond mere forbearance in 1985 in its *Sixth Report and Order,* 99 F.C.C.2d 1020 (1985), by making detariffing mandatory and by telling non-dominant carriers that it would no longer even accept their rate filings under section 203. For reasons not apparent, MCI, an apparent beneficiary of the *Sixth Report,* challenged that order in this court on the grounds that the FCC had no authority to eliminate a requirement of the Communications Act. *See MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) (*"MCI v. FCC"*). We vacated the Sixth Report after concluding that it exceeded the Commission's statutory authority. We explicitly did not decide the validity of the earlier *Fourth Report and Order,* but our decision not to do so was predicated on the assumption that the *Fourth Report* was (at least arguably) immune from review

[2] In its *First Report and Order,* 85 F.C.C.2d 1 (1980), the Commission determined that among interexchange telephone carriers, only AT&T exerted market power and was thus dominant. *See id.* at 22-24, 27-30.

under *Heckler v. Chaney,* 470 U.S. 821 (1985), as an exercise of enforcement discretion. *See MCI v. FCC,* 765 F.2d at 1190 n.4.

The Commission, in subsequent litigation, did not help to clarify the nature of the *Fourth Report.* In 1985 the FCC argued that the *Fourth Report* could be "fairly characterized" as an exercise of the agency's enforcement discretion and that it was thus immune from review. Respondent's Brief at 27, *MCI Telecommunications Corp. v. FCC,* 799 F.2d 773 (D.C. Cir. 1984) (No. 84-1402) (Memorandum Order). In the same brief, however, the Commission referred to the *Second* and *Fourth Reports* as rules designed to "exempt" some carriers from the filing requirements of the Act. *Id.* at 29.

In August 1989, with the FCC's characterization of the *Fourth Report* apparently still uncertain, AT&T filed a complaint against MCI under section 208 of the Communications Act. Section 208 allows any person injured by a violation of the Act to file a complaint with the Commission, *see* 47 U.S.C. § 208(a) (1988),[3] and requires the Commission to investigate the complaint and

[3] 47 U.S.C. § 208(a) states:

> Any person, any body politic or municipal organization, or State Commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provision thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. . . . If . . . there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

47 U.S.C. § 206 states:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or

issue an order concluding the inquiry within 12 to 15 months. *See id.* § 208(b). AT&T claimed that since 1987, MCI had been violating, and continued to violate, section 203(a) by charging certain customers special negotiated rates that it had not filed with the FCC. AT&T sought both damages and a cease and desist order. According to AT&T, MCI's actions injured AT&T by putting AT&T at a competitive disadvantage. While AT&T had to file all of its rates with the Commission, MCI did not, thus not only making it more difficult for AT&T to match MCI's rates, *cf. Regular Common Carrier Conference v. United States,* 793 F.2d 376, 379 (D.C. Cir. 1986), but also enabling MCI and other competitors to entangle AT&T in burdensome proceedings before the Commission by filing oppositions to the rates AT&T filed.

MCI, in response, did not deny AT&T's factual allegations. It relied on the *Fourth Report.* According to MCI, the *Fourth Report* was a substantive rule that removed the nondominant carriers' obligation to file all of their rates under section 203(a). AT&T contended, in accordance with our tentative understanding, that the *Fourth Report* had been merely a statement of the FCC's enforcement policy and therefore MCI still had an independent obligation imposed by statute to file all of its rates. If the *Fourth Report* were a substantive rule that purported to remove obligations imposed by the statute, AT&T argued, it was invalid under our *MCI v. FCC* opinion because it exceeded the FCC's statutory authority.

Despite section 208's requirement that the Commission issue an order concluding its investigation into a com-

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declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this chapter. . . .

plaint within 12 months, *see* 47 U.S.C. § 208(b)(1), AT&T's complaint went unresolved for a good deal longer. The FCC first determined that the complaint raised a broad issue of policy and should be transferred to its policy division. Thereafter, a decision on the complaint was further postponed pending the conclusion of the Commission's rulemaking on *Competition in the Interstate Interexchange Marketplace. See Report and Order,* 6 F.C.C. Rcd. 5880 (1991). Finally, in October 1991, 25 months after the complaint had been filed, AT&T petitioned this court for a *writ of mandamus* ordering the Commission to issue a cease and desist order against MCI. We dismissed the petition in January 1992 when the FCC announced that it would issue an order concluding its investigation by January 30, 1992.

On January 28, 1992, the FCC concluded its inquiry but nevertheless declined to decide forthrightly the issue before it. *See AT&T Communications v. MCI Telecommunications Corp.,* 7 F.C.C. Rcd. 807 (1992). Although the Commission, dispelling prior confusion, determined conclusively that the *Fourth Report and Order* was a substantive rule upon which MCI had properly relied, *see id.* at 809, it purported not to consider whether the *Fourth Report,* so interpreted, was valid under the Communications Act. Instead, the Commission said the *Fourth Report*'s "validity" would be better considered in a rulemaking that would afford all interested parties an opportunity to comment. *Id.* And the Commission announced such a rulemaking on the same day it issued the order concluding the investigation. *See Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking,* 7 F.C.C. Rcd. 804 (1992). The Commission thus asserts that it dismissed AT&T's claim for a cease and desist order without ever determining whether MCI was violating the Communications Act. Nevertheless, the Commission rejected AT&T's claim for damages because it determined that MCI was entitled to rely on the *Fourth Report* as a substantive rule that removed

MCI's obligation to file all its rates. *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. at 809. The FCC reasoned that even if the rule were declared invalid under the Communications Act, the consequence of that invalidity (whatever it may be) should not apply retroactively to MCI's past conduct. *Id.*

II.

A.

It is rather apparent that, because the Commission fears the *Fourth Report* cannot withstand judicial scrutiny (at least in our court), it wants to avoid judicial review of the rule. This will allow the *Fourth Report* to continue to govern the conduct of carriers for as long as possible. The Commission relies on *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), for the general proposition that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203 (citation omitted). The maxim of administrative law permits an agency to develop a body of regulatory law and policy either through case-by-case decisionmaking (a quasi-adjudicative process) or through rulemaking (a quasi-legislative process). The Commission claims that it merely exercised a choice between these methods by dismissing AT&T's complaint *without ruling on the merits,*[4] and that it then put on its quasi-legislative hat to reconsider the *Report* in a new rulemaking. The difficulty with the Commission's approach—a sort of administrative law shell game—is that it is a logical *non sequitur* to AT&T's complaint. AT&T's complaint asserts that MCI is acting

[4] Whether it was possible analytically for the FCC to dismiss AT&T's complaint without *implicitly* ruling on the claim is another question. As we discuss below in Part III, we think that by dismissing the complaint the Commission necessarily sanctioned MCI's conduct under the statute.

illegally *under present law*, that MCI has violated the law in the past, and that AT&T is and has been injured by MCI's behavior. AT&T did not, as it can do under the Administrative Procedure Act (APA), request a new rulemaking. *See* 5 U.S.C. § 553(e). When presented with AT&T's complaint, the Commission had an obligation to answer the questions it raised and to decide whether MCI had violated the statute.

The agency's responsibilities as an adjudicator are especially clear under the Communications Act. Section 206-208 of the Act gave AT&T the right to press a claim for damages suffered due to violation of the Act either in federal court or before the Commission. *See* 47 U.S.C. §§ 206-208. The statute thus expressly sets up the Commission as an adjudicator of private rights.[5] The question before the Commission as the adjudicator was whether or not MCI had been, and currently was, violating the law. If it was, at a minimum (putting aside the question of whether AT&T has a right to damages) AT&T was entitled to a cease and desist order at that point. The FCC's proposal to consider the general problem AT&T raises in a future rulemaking—a process designed to consider whether to issue new normative standards—is, when one thinks hard about it, a non-response to the complaint. It is similar to a judge who dismisses a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has an obligation to decide the complaint under the law currently applicable. *Cf. Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1019 (1990).

[5] Presumably, AT&T chose to bring its case before the Commission because AT&T is primarily interested in a cease and desist order. The statute does not explicitly grant the district court power to issue such an order, but the parties and intervenors all assume that the Commission could grant such relief.

Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The choice an agency has between different methods of "making law" is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint. Here, as in *Meredith*, the Commission "confuses its quasi-judicial role with its quasi-legislative one." *Meredith*, 809 F.2d at 873.

The Commission claims that a two-party adjudication would not have been suitable to consider the validity of the *Fourth Report* because so many carriers in the industry have an interest in the question. We do not think the FCC had any alternative but to confront the issue. However, it easily could have solicited the views of other carriers. The FCC was quite free to invite them to intervene or file briefs as non-parties. *See General Amer. Transp. Corp. v. ICC*, 883 F.2d 1029, 1030 (D.C. Cir. 1989) (Silberman, J., concurring in denial of rehearing). Indeed, nothing stopped the FCC from initiating a companion rulemaking when AT&T filed its complaint—as long as the Commission concluded its inquiry into AT&T's complaint within the 12 to 15 month period required by section 208 of the Act. Nor are we impressed with the FCC's argument that section 208 authorized the Commission's action by giving the agency authority to investigate complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208(a). A future rulemaking that will consider modifying the *Fourth Report* is in no sense an investigation of AT&T's complaint. It could not possibly be, because a rulemaking can affect the conduct of parties only *prospectively*; it does not determine the legality of past conduct. AT&T, it must be understood, challenged MCI's *past* and present actions. A

cease and desist order, to be sure, can be thought to provide prospective *relief*, but it must be based on the premise that existing law has been violated.

The Commission's more interesting argument is that it could not "consider" AT&T's challenge to the legality of the *Fourth Report* because it could not disregard its own rule in an adjudication. *See American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751 (D.C. Cir. 1985). We have never held, however, that an agency is obliged to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful. Our opinion in *Meredith* points in the other direction. There we concluded that the FCC was obliged to entertain petitioner's claim that the FCC's Fairness Doctrine was unconstitutional, whether or not the FCC changed its policy in a new rulemaking. *See Meredith*, 809 F.2d at 873-74. Similarly, then Judge Scalia, concurring in *American Federation of Government Employees*, recognized that in some situations, when an agency declines to apply its own rule in an adjudication "we would be justified [on appeal] in looking beyond the defect of inconsistency, to affirm an adjudication on the ground that its result was mandated by statute and that the conflicting rule was simply unlawful." *American Fed'n of Gov't Employees*, 777 F.2d at 760 (Scalia, J., concurring). Judge Scalia's concern for situations only dimly perceived in that case seems very much on the mark, for otherwise an agency would be required to apply a rule in an adjudication until it had revoked the rule in a new rulemaking, even if the Supreme Court had invalidated the interpretation upon which the rule was based.

In any event, the Commission's stated concern seems to us to be a red herring. If the agency believed its rule was invalid and did not want to so hold in an adjudication, as we mentioned above, it immediately could have started a companion rulemaking to repeal the rule. The agency's

own lawyers could have determined the rule was inconsistent with the statute and a Notice of Proposed Rulemaking would then have so stated.[6] The rule then simply could have been revoked and perhaps a new rule could have been adopted. But surely the agency was not required to apply the invalid rule in the meantime.

Typically, of course, when an agency's rule is challenged in an adjudication as inconsistent with the agency's authorizing statute, the agency rejects the challenge on the merits and the supposed concerns the FCC expresses here are never voiced. The agency applies its rule because it believes the rule is lawful, and the agency is prepared to stand by it forthrightly in a subsequent appeal. The FCC's unusual position here is plainly engendered by a desire to keep the rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review. The Commission thought to achieve this goal by dismissing the complaint, thereby maintaining the legal regime created by the rule. Yet, it sought to do so without squarely relying on the rule to justify the dismissal. In that way, the Commission hoped to avoid judicial review. We have little difficulty in concluding that it was arbitrary and capricious for the Commission to dismiss AT&T's complaint with only a promise to address the legal issue it raised in a future rulemaking. To the extent that the Commission thought it had discretion to postpone decision to a rulemaking, it misunderstood its role as an adjudicator.

B.

The Commission, not surprisingly in light of its obvious strategy, insists that even if we conclude, as we do, that the agency's dismissal of AT&T's complaint violated the law, we should not reach the validity of the *Fourth Report*. According to the Commission, the order below did

[6] Here, of course, the agency also had the benefit of the parties' briefs.

not apply the *Fourth Report* or consider its validity and, indeed, did not even determine the lawfulness of MCI's conduct. Thus, we are told we must remand the case to the agency, so that the Commission can determine the validity of the rule in the adjudication.

We are quite aware that to accept the Commission's argument would be to allow the FCC's troubling tactics largely to succeed. The FCC, it will be recalled, did not decide AT&T's complaint within the statutory time period. It was only after AT&T brought a *mandamus* petition before us 25 months after the complaint had been filed that the FCC agreed to issue its decision. To remand the case now for the FCC to "consider" the validity of the *Fourth Report* would simply permit the FCC to delay the process further. Moreover, a remand seems especially unnecessary in light of our prior opinion in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), which, as we discuss below, virtually settles the issue in this court.

Still, we need not rely on these factors to conclude that the *Fourth Report* is properly before us. It is well established that a rule may be reviewed when it is applied in an adjudication—an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review. *See NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).[7] Despite the Commission's protestations to

[7] A simple citation to these cases also suffices to dispense with the FCC's claim that AT&T's challenge to the *Fourth Report* was not timely because it was not filed when the *Report* was first issued. The FCC's argument that the complaint was not timely seems particularly meritless in this case because it was not until the FCC issued the very order under review here that it was clear that the *Fourth Report* was a substantive rule that altered carriers' obligations under the statute. In any event, the contention that AT&T's challenge was not timely, or, as the Commission now

the contrary, we think the Commission necessarily relied on the *Fourth Report* in its decision to dismiss AT&T's complaint.

The *Report*, and the Commission's desire to protect it, clearly provided the underlying rationale for the order under review. The Commission explicitly justified its decision to dismiss on the grounds that the complaint challenged "the Commission's previously adopted and effective forbearance rule." *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 801, 809 (1992). And, in denying AT&T retrospective relief, the Commission relied on its conclusion that the *Fourth Report* was a substantive rule that removed the obligation of carriers to file tariffs. *Id.* The FCC's only reason for clarifying its review of the *Report* was to provide MCI and other carriers with a regulatory sanction for their behavior. As the Commission concluded: "It would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, *which the Commission explicitly approved in advance*, may give rise to a finding of liability." *Id.* (emphasis added).

Whatever tortured language the Commission used to describe its actions,[8] the decision to dismiss AT&T's com-

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argues, that it is barred by the doctrine of laches, cannot justify the Commission's decision since neither reason was cited by the Commission in its original order. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

[8] The Commission claimed that it could dispose of AT&T's claim for "prospective relief" (a cease and desist order) because, although "nominally stated in terms of a request for relief against MCI, [it] is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule." *See AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 807, 809 (1992). That is, of course, true, but it hardly justifies the Commission's ostensible refusal to consider the validity of the rule. Whether the relief to be considered is damages or a cease and desist order, the question before the Commission is whether MCI has been and is violating the law.

plaint necessarily must have rested on the *Fourth Report* and placed an implicit imprimatur on the *Fourth Report*'s interpretation of the statute. The notion the FCC advances before us—that it did not apply the *Report* and did not determine whether or not MCI had violated the statute—suggests that its order merely left the parties in legal limbo. But the Commission ignores the practical effect of its order. In dismissing the complaint, the Commission rejected AT&T's request for relief and definitively sanctioned MCI's conduct. There is no conceivable basis for the agency's action other than a temporary reliance on the *Fourth Report's interpretation of the statute* as a valid statement of the law, at least for the interim period between the time of the dismissal and the conclusion of the new rulemaking. Notwithstanding its claims for discretion to proceed either by rulemaking or by adjudication, the Commission does not, and could not, claim that pending a new rulemaking it has authority to decide complaints contrary to the law. Once the Commission's necessary reasoning is recognized, the Commission's sophistic claim that it did not apply the *Report* or pass on its validity evaporates.

Finally, we see no need to remand to obtain an agency interpretation of the statute.[9] The Commission, of course, set forth its statutory construction when it promulgated the rule. When a rule is challenged in its application, courts typically examine the validity of the rule on the basis of the reasoning offered when the rule was originally promulgated. *See, e.g., National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 607 F.2d 392, 425 n.59 (D.C. Cir. 1979), *cert. denied*, 444 U.S 1025 (1980); *Network Project v. FCC*, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975). And, in any event, the agency has already defended (unsuccessfully) in *MCI v. FCC* the very statutory interpretation that underpins the *Fourth Report*. Accordingly, we pass on to the merits.

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[9] We would normally be obliged to follow this course if the statutory language were ambiguous.

III.

It is unnecessary to consider any more whether the *Fourth Report* is merely an enforcement policy. The Commission has determined unequivocally that it is a substantive rule [10] designed to affect not only the FCC's enforcement policies, but also the relationships and rights of the "dominant" carrier, AT&T, and all other carriers. As a substantive rule, the *Fourth Report* is simply not defensible in this court. Its validity hinges on the interpretation of section 203 of the Communications Act. Section 203(a) states that "every" carrier "shall" file its tariffs with the Commission. 47 U.S.C. § 203(a). We said in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), "Shall . . . is the language of command." *Id.* at 1191 (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). The Commission points out (as it did in *MCI*) that section 203(b) allows the Commission to "modify any requirement" of the section "in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2). According to the FCC, that language allows the Commission to remove the filing obligation from certain carriers as long as it continues to enforce the substantive requirements of sections 201 and 202—namely that rates be just, reasonable, and nondiscriminatory. *See* 47 U.S.C. §§ 201-202. Although the argument was not insubstantial when made initially, we concluded that the language of the statute was not susceptible to the Commission's reading.[11]

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[10] The language of the *Report* amply justifies the Commission's reading. The *Report* begins by proposing "to remove . . . regulatory requirements for non-dominant carriers," *Fourth Report and Order*, 95 F.C.C.2d 554, 555 (1983), and concludes by giving carriers, subject to the order, "permission to cancel their tariffs on file with this Commission," *id.* at 582.

[11] Our opinion, although it does not cite *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), postdates that case.

In *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), as noted above, we concluded that section 203(b) could not be interpreted to permit the Commission's attempt to *require* nondominant carriers to stop filing tariffs under section 203(a). We struck down the mandatory detariffing rule contained in the Commission's *Sixth Report and Order*. *See MCI*, 765 F.2d at 1195-96. To be sure, we explicitly reserved holding on the permissive detariffing scheme of the *Fourth Report*, but only because we believed the *Report* "arguably immune from judicial review" as a simple statement of enforcement policy. *Id.* at 1190 n.4. Our reasoning in *MCI* forecloses the Commission's argument in this case. We said in *MCI* that the language of section 203(b) "suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." *Id.* at 1192. To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." *Id.* (quoting BLACK'S LAW DICTIONARY 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligations to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act.[12]

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[12] As we discussed in *MCI*, the Second Circuit's interpretation of section 203(b) is similarly restricted. *See id.* at 1192 (citing *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); and *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973)).

As AT&T points out, our opinion in *MCI* is somewhat buttressed by the more recent Supreme Court case, *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). There, the Court rejected the ICC's "deregulatory" interpretation of the quite similar rate-filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762 (1988), which share a common ancestor with the Communications Act, the original Interstate Commerce Act. Due to

We understand fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT&T, which the Commission regards as the dominant carrier, differently from the way it applies the tariff provision to other competing carriers. We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction. The Commission will have to obtain congressional sanction for its desired policy course.

IV.

There remains AT&T's claim for damages. The Commission, as part of its strategy to avoid judicial review of the *Fourth Report*, disposed of this claim by concluding that, assuming, *arguendo*, the *Fourth Report* was contrary to law, AT&T would still not be entitled to damages because any such determination of law should not be applied "retroactively." In other words, *MCI* was entitled to rely on the Commission's interpretation of the

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this shared lineage, an interpretation of one of the modern statutes is often thought instructive in judicial construction of the other. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990); *American Broadcasting Cos. v. FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T v. FCC*, 487 F.2d at 873-74. In *Maislin*, a carrier had negotiated a rate with a shipper that was below the carrier's filed rate. When the carrier tried to collect the filed rate rather than the negotiated rate, the ICC, under its Negotiated Rate Policy, rejected the carrier's claim. The Supreme Court, however, disapproved the ICC's interpretation of the Act. "[B]y sanctioning adherence to unfiled rates," the Court said, the ICC had "undermine[d] the basic structure of the Act." *Maislin*, 497 U.S. at 132. The Court concluded that compliance with the filing requirements was " 'utterly central' to the administration of the Act," *id.* (quoting *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986)) and that the obligation to charge only filed rates had "always been considered essential to preventing price discrimination," *id.* at 126. Despite the harsh result for a shipper who had negotiated a lower rate, the Court thought the ICC must adhere to the "filed rate doctrine" that requires carriers to charge, and shippers to pay, *only* the rate filed with the ICC.

statute embodied in the *Fourth Report*. The Commission applied the five factor test we have used to determine whether new law developed by an agency in adjudication should be applied retroactively, *see Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *see also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 913 (1988), and decided the answer to the hypothetical question in this case was no. AT&T claims that, in light of our *MCI* decision, an explicit Commission recognition that its *Fourth Report* is *ultra vires* is no real change in the law.

We do not think it appropriate to resolve this dispute and apply the five factor test at this stage because we do not fully understand what the Commission sees as "the law" to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our *MCI* interpretation, it would have to explain why that is a change in the law. The Commission may be relying on its right to refuse to acquiesce in one (or more) court of appeals' interpretation of its statute, but, then, how does it explain the interrelationship between a party's possible cause of action in the district court and one before the Commission? Would parties be entitled to damages in the United States District Court for the District of Columbia (particularly in light of our *MCI* opinion), but not before the Commission?

* * * *

We remand the case to the Commission, having vacated the *Fourth Report* as contrary to the Communications Act, with instructions to reconsider AT&T's claim for relief. It would appear that AT&T is entitled promptly to a cease and desist order against MCI. We do not direct the Commission to provide specific relief,

however, partly out of a reluctance to direct an agency as to the exact remedy to be employed and partly because of our expectation that the practices sanctioned by the *Fourth Report* will cease since carriers who do not file tariffs will be subject to damage suits in our district court. The Commission will also have to reconsider AT&T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.

It is so ordered.

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. E-89-297

IN THE MATTER OF AT&T COMMUNICATIONS,
Complainant,
v.

MCI TELECOMMUNICATIONS CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1992 Released: January 28, 1992
By the Commission:

I. INTRODUCTION

1. On August 7, 1989, AT&T Communications filed the above-captioned formal complaint with this Commission pursuant to sections 206 and 208 of the Communications Act [1] and Sections 1.721 *et seq.* of the Commission's Rules.[2] AT&T alleges that MCI Telecommunications Corporation provides common carrier telecommunications services to several customers at rates, and on terms and conditions, that are not filed or contained in interstate tariffs, in violation of section 203 of the Communications Act.[3]

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[1] 47 U.S.C. §§ 206 and 208.

[2] 47 C.F.R. § 1.721 *et seq.*

[3] 47 U.S.C. § 203. Section 203(a) provides that "[e]very common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open

2. Pursuant to our authority under section 208 of the Act, we deny AT&T's complaint in part and dismiss it in part. It would be manifestly unfair to impose liability on MCI for past conduct which the Commission has explicitly authorized. Moreover, the complaint calls into question the prospective lawfulness of longstanding rules that play a fundamental role in our regulation of the interstate marketplace. Any decision relative to those rules could have a profound effect on a broad range of consumers and providers of telecommunications services. This decision should not be made in an adjudicatory proceeding between two parties.

3. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.[4]

II. BACKGROUND

4. In 1979, the Commission initiated the *Competitive Carrier* rulemaking proceeding in order to consider amendment of the tariff filing requirements for competitive common carriers, as well as other rule changes relating to facilities and services authorizations.[5] In the *Sec-*

for public inspection, schedules showing all charges for itself . . . and showing the classifications, practices and regulations affecting such charges." Section 203(c) provides that "[n]o carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act . . . and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith. . . ."

[4] *See* Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 92-13, FCC 92-35, adopted January 24, 1992.

[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308, 309 (1979).

ond Report and Order, adopted in 1982, the Commission concluded that nondominant telecommunications common carriers—defined as those carriers without market power—lacked both the incentive and ability rationally to charge rates that would violate the Communications Act's substantive requirements that rates be just and reasonable and not unreasonably discriminatory.[6] For such carriers, the Commission concluded that tariff filing requirements tended to "inhibi[t] price competition, service innovation and the ability of firms to respond quickly to market trends," [7] and therefore were inconsistent with the Act's broader mandate "to make available . . . to all people of the United States a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." [8] Accordingly, the Commission adopted its previous tentative conclusion that, in these circumstances, section 203 of the Act did not mandate the filing of tariffs by nondominant carriers.[9]

5. Taking a cautious, incremental approach, the Commission limited the scope of the initial forbearance rule

[6] *See* 47 U.S.C. §§ 201(b), 202(a).

[7] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59, 65 (1982).

[8] *Id.* at 64, *quoting*, 47 U.S.C. § 151.

[9] *Id.* at 71, *citing*, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 479, 484 (1981). The Commission concluded that the statute's substantive standards could be enforced most effectively against nondominant carriers through the complaint procedures specified in section 208 of the Act, rather than through tariff investigations. Second Report and Order, 91 F.C.C.2d at 70-71. As we state in note 26, *infra*, we do not consider AT&T's complaint an attempt to enforce the substantive provisions of the statute. AT&T, in this case, is using the complaint process in order to attempt to change a long-standing Commission rule.

to resale carriers, ordering that such carriers "no longer need adhere to . . . the tariff filing requirements of section 203," although they were free to continue to file tariffs if they so chose.[10] One year later, in the *Fourth Report and Order,* the Commission extended forbearance to all nondominant interexchange carriers (IXCs) including so-called "specialized carriers" such as MCI.[11]

6. Neither AT&T nor any other participant in the *Competitive Carrier* proceeding sought judicial review of the Commission's decision to forbear from tariff regulation of nondominant carriers. The Commission to date has not reconsidered those policies and rules, and no court has reviewed them.[12] Today there are in excess of four hundred nondominant IXCs that offer common carrier services.[13] Few, if any, of these carriers file tariffs

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[10] *Id.*, at 73.

[11] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 F.C.C.2d 554 (1983). The Commission also expanded the class of nondominant IXCs to include miscellaneous common carriers, domestic satellite carriers (domsats), domsat resellers, domestic operations of Western Union, international record carriers, other record carriers, and interexchange carriers affiliated with exchange telephone companies. *Id.* 95 F.C.C.2d at 557.

[12] Later in the *Competitive Carrier* proceeding, the Commission adopted rules which compelled nondominant carriers to cancel their existing tariffs and prohibited failure tariff filings. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Sixth Report and Order, 99 F.C.C.2d 1020 (1985). Mandatory forbearance, as it was called, was overturned after judicial review. *See MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) (hereinafter *"MCI v. FCC"*). The court in that case, however, explicitly "d[id] not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 1190-1191, n.4.

[13] Summary of Long Distance Carriers, Industry Analysis Division, FCC, November 22, 1991, Table 1.

for all their service offerings, and most do not file any tariffs at all.

A. *The Complaint*

7. AT&T's complaint alleges that MCI provides interstate telecommunications services to large business customers, at rates and on terms and conditions that are not filed or contained in MCI tariffs.[14] According to AT&T, MCI's actions violate section 203 of the Communications Act.

8. AT&T argues that MCI is not relieved of its obligation to file tariffs by its classification as a nondominant carrier under the Commission's *Competitive Carrier* rules. In support of its position, AT&T cites *MCI v. FCC,* which, it claims, held that the tariffing provisions of Section 203 are mandatory, and may not be lifted as to any carrier.[15] AT&T also cites a 1990 Supreme Court decision, *Maislin Industries, U.S., Inc. v. Primary Steel Inc.,* which AT&T claims, confirms that MCI's conduct violates section 203.[16]

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[14] Specifically, AT&T alleges that MCI provides off-tariff service to Merrill Lynch, the Westin Hotel Company, United Airlines, the Department of Defense, the University of Colorado at Boulder, and Uniguard Security Insurance Program. AT&T Complaint at 7-10.

[15] AT&T Complaint at 3, *citing, MCI v. AT&T,* 765 F.2d at 1188, 1192-93.

[16] Motion of American Telephone and Telegraph Company for Summary Decision at 7-11, *citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* —— U.S. ——, 110 S.Ct. 2759 (1990) (hereinafter "Maislin"). In March 1990, we initiated a comprehensive examination of the state of competition in the long-distance marketplace with a view toward relaxing some of our regulatory controls over AT&T. Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd. 2627 (1990). Pending completion of this proceeding, we deferred consideration of AT&T's complaint. The Commission recently adopted rules in that proceeding. Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd. 5880 (1991), *recon. pending.*

B. *MCI's Response*

9. MCI admits that it has provided service to the six named customers other than by tariff [17] but argues that AT&T has failed to establish a *prima facie* case against MCI. MCI claims that it has, at all times, abided by the Commission's *Competitive Carrier* rules and that its actions therefore fully complied with the Communications Act as interpreted and applied by the Commission.[18] MCI argues that *MCI v. AT&T* is inapposite to AT&T's complaint since that case only decided that mandatory forbearance was unlawful.[19] Likewise, MCI argues that, since *Maislin* involved a different agency under a different statute involving different factual circumstances, that case has no bearing on the non-tariff arrangements that MCI and other nondominant IXCs have entered into with customers.[20]

10. MCI also argues that AT&T's complaint is fundamentally a petition for reconsideration of the Commission's *Competitive Carrier* rules. It claims that, as such, the complaint is untimely in violation of Section 405 of the Act and Section 1.106(f) of the Commission's Rules.[21]

11. Finally, MCI argues that AT&T's complaint is not the proper vehicle for modifying the *Competitive Carrier* rules. It states that if the Commission were to decide within the context of the complaint that MCI's failure to tariff its service to some customers is a violation of Sec-

[17] MCI's Opposition To Motion To Compel at 2.

[18] MCI's Motion to Dismiss at 1-3, 7-9.

[19] MCI's Motion to Dismiss at 6-7, 16-18.

[20] MCI's Opposition to Motion of American Telephone and Telegraph Company for Summary Decision at 4-5.

[21] Section 405 of the Act and Section 1.106(f) of the Commission's Rules establish a 30-day deadline for filing requests for reconsideration of Commission orders. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

tion 203 of the Act, the Commission would be modifying *Competitive Carrier* without benefit of an appropriate rulemaking. It argues that any reassessment of those policies and rules should involve all parties who are potentially affected by such reassessment.[22]

III. DISCUSSION

12. We now deny AT&T's complaint in part and dismiss it in part.[23] We deny AT&T's complaint insofar as it seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission. That claim directly conflicts with the duly adopted "forbearance" rule upon which MCI was entitled to rely. We dismiss AT&T's complaint insofar as it seeks injunctive relief requiring MCI to file tariffs in the future. AT&T seeks, in effect, the wholesale repeal of that rule, which has governed interexchange competition for the better part of a decade. We find such broad relief to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. By companion order adopted today, we initiate a rulemaking proceeding to reexamine our forbearance rule.[24]

13. We deny AT&T's complaint insofar as it claims that MCI is liable for damages because its practice of providing service off-tariff violates section 203 of the Act. MCI's conduct, in this regard, at all times complied with what the Commission, in the *Fourth Report and Order*, has said MCI may do, *i.e.*, provide interstate telecommunications service at rates and on terms that are not

[22] MCI's Motion to Dismiss at 13-15.

[23] We note that section 208(a) of the Communications Act requires the Commission to investigate complaints "in such manner and by such means as it shall deem appropriate."

[24] *See* note 4, *supra*.

contained in tariffs on file with the Commission.[25] Contrary to AT&T's claim that the forbearance policy reflects merely an exercise of the Commission's prosecutorial discretion, the *Fourth Report and Order* adopted a binding substantive rule that removed the requirement that nondominant carriers such as MCI file tariffs. Under those circumstances, it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability.[26] Any off-tariff service offerings by MCI have been made pursuant to rules promulgated by the FCC in orders that were not challenged on review and have long since become final. We will not award damages against MCI based simply on allegations made years later that the rules to which MCI conformed its conduct are beyond our authority to adopt.

14. We also dismiss AT&T's complaint insofar as it seeks prospective relief enjoining MCI from providing off-tariff services. This claim, while nominally stated in terms

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[25] While AT&T asked the Commission in its complaint to investigate whether MCI had violated sections 201(b) and 202(a) of the Communications Act, *see* AT&T Complaint at 12-13, it appears to have disavowed this request and limited its complaint to alleged violations of section 203 of the Act. *See* AT&T Petition for Writ of Mandamus, Case No. 91-1487 (D.C. Cir., filed October 4, 1991), at 2-3; *MCI Telecommunications Corp. v. FCC*, No. 89-1382, Transcript of Oral Argument held September 11, 1990, at 50-51 (comments of AT&T counsel in petition for review of Commission's Tariff 12 decision).

[26] *Cf. Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co.*, 284 U.S. 370, 389 (1932); *Nader v. FCC*, 520 F.2d 182, 202-203 (D.C. Cir. 1975) (rates charged consistent with agency prescription protect carrier against subsequent claim that rate was unlawful). *See also Bowen v. Georgetown University Hospital*, —— U.S. ——, 109 S.Ct. 468, 480 (1988) (Scalia, J., concurring) (suggesting that retroactive adjudication may be improper where conflicting "pre-existing interpretive rule construing [statutory] requirements is in effect").

of a request for relief against MCI, is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule.

15. It is well established that agencies have broad discretion in determining whether to make policy via rulemakings or adjudications. Thus, in *SEC v. Chenery*, the United States Supreme Court said that "the choice made between proceedings by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[27] The Court recognized, however, that rulemaking proceedings are more appropriate for considering general rules of widespread applicability.[28]

16. The Commission's forbearance rule was adopted in a notice and comment rulemaking proceeding and has been in place for almost ten years. This rule represents one of the cornerstones of our regulation of the long-distance industry. Any change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation. It would be inappropriate for us to consider a modification or repeal of this policy, with so potentially widespread an impact, in the context of a two-party adjudicatory proceeding, as opposed to a rulemaking proceeding. In a rulemaking, all interested parties will have an opportunity to comment. In addition, a rulemaking proceeding will permit us to address our forbearance rule as it applies to all nondominant carriers, and to consider and implement any changes that we may make to it on an industry-wide basis.[29] Given the funda-

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[27] 332 U.S. 194, 203 (1947).

[28] *Id.* at 202, 203; *see also American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985); *Telocator Network of America v. FCC*, 691 F.2d 525, 551 (D.C. Cir. 1982).

[29] By contrast, any order that we issue on AT&T's complaint would necessarily bind only MCI. *See NLRB v. Wyman-Gordon*

mental importance of these matters, the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may be necessary.

IV. CONCLUSION

17. We now deny in part and dismiss in part AT&T's complaint. To the extent that AT&T seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission, AT&T's claim directly conflicts with the duly adopted and effective "forbearance" rule upon which MCI was entitled to rely. To the extent that AT&T seeks injunctive relief requiring MCI to file tariffs in the future, we find such broad relief changing the basic rules governing the long-distance industry to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.

V. EX PARTE RULES

18. In light of the interrelationship between this proceeding and the Notice of Proposed Rulemaking we

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Company, 394 U.S. 759, 763-766 (1969) ("adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. . . . But this is far from saying . . . that commands, decisions or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public.") At the same time, such an order would have major precedential implications for other nondominant IXCs, and could, depending upon the decision, create considerable uncertainty both as to their regulatory status and the lawfulness of many of their current offerings.

adopt today, to the extent this complaint proceeding remains pending through a petition for reconsideration or appeal of this order, the proceeding will henceforth be deemed a nonrestricted proceeding under the Commission's *ex parte* rules.[30] *Ex parte* presentations will be permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[31]

VI. ORDERING CLAUSE

19. For the reasons set forth above, pursuant to 47 U.S.C. § 208, IT IS ORDERED THAT AT&T'S above-referenced complaint is DENIED in part and DISMISSED in part.

FEDERAL COMMUNICATIONS COMMISSION

DONNA R. SEARCY
Secretary

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[30] *See* 47 C.F.R. § 1.1200(a).

[31] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).